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Money Laundering Bill Among the Casualties of Year-end Gridlock

By Stefan D. Cassella, Assistant Chief, AFMLS, Criminal Division

The 105th Congress adjourned without enacting any major changes to the federal money laundering laws. In particular, Congress failed to take any action on H.R. 3745, a comprehensive, bipartisan international money laundering bill sponsored by House Crime Subcommittee Chairman Bill McCollum (R-Fla.), or its Senate counterpart, S. 2011, which was sponsored by Judiciary Committee Chairman Orrin Hatch (R-Utah) and Ranking Member Patrick Leahy (D-Vt.).

Congress also failed to act on H.R. 4005, a bill relating to money laundering at financial institutions sponsored by House Banking Committee Chairman Jim Leach (R-Iowa), and H.R. 4691, a bill to criminalize the smuggling of bulk cash that was drafted by the Department of Justice and sponsored by Rep. Marge Roukema (R-N.J.). Another casualty was S. 2449, a bill sponsored by Sens. Max Cleland (D-Ga.) and Charles Grassley (R-Iowa) that would have enhanced law enforcement's ability to seize bulk cash that is being transported on highways and through airports by currency couriers.

In each case, the cause of the failure to address a major law enforcement problem by enacting necessary legislation was old-fashioned political gridlock. All of the money laundering proposals had bipartisan support, and some, including the McCollum and Hatch-Leahy bills, went virtually through the committee process in the weeks before the congressional session came to a close. But they were blocked by Rep. Henry Hyde (R-Ill.), Chairman of the House Judiciary Committee, who was disappointed that Congress—in

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response to overwhelming opposition from law enforcement—had failed to take any action on his proposed "reforms" to the civil forfeiture laws.

In a series of letters to other committee chairman, Rep. Hyde requested that all changes to the civil and criminal forfeiture laws that were supported by law enforcement, as well as any related money laundering provisions, be blocked until his civil asset forfeiture reforms are enacted. For example, on October 6, 1998, Rep. Hyde wrote to Sen. Hatch, stating his unequivocal opposition to every provision in a bipartisan anti-money laundering bill except for the title of the bill, the table of contents, and a handful of minor and technical amendments. (*See* text of Rep. Hyde's letter at 3.) Rep. Hyde sent a similar letter to Rep. Leach, blocking a provision in his bill that would have extended the limitations period for the forfeiture of fungible property in bank accounts under 18 U.S.C. § 984 from one- to two-years.

Among the casualties of Rep. Hyde's opposition were a number of noncontroversial provisions that Rep. Hyde himself has supported in the past. For example, the Hatch-Leahy bill contained the following provisions that had appeared in 1997 in Rep. Hyde's own bill, H.R. 1965:

- a 60-day freeze on U.S. assets of persons arrested abroad;
- the admission of foreign business records in federal civil cases; and
- the authority for district court to order defendants in criminal cases to repatriate assets subject to forfeiture.

Also stripped from the money laundering bill were provisions that did not relate to forfeiture at all. For example, Rep. Hyde opposed:

- a long-arm statute giving the district courts jurisdiction to impose financial sanctions on foreign banks that launder money in the United States under section 1956(b);
- the addition of foreign offenses—including terrorism, public corruption and fraud—to the list of money laundering predicates;
- the authority to charge money laundering as a course-of-conduct offense so that each financial transaction does not have to constitute a separate count;
- a venue provision for money laundering to address the Supreme Court's decision in *Cabrales*; and
- the clarification of section 1957 to eliminate the "dirty-money-last-out" rule in *United States v. Rutgard* that makes it difficult to use that statute in the Ninth Circuit.

Finally, Rep. Hyde blocked all significant civil forfeiture improvements, as well as a panoply of noncontroversial minor and technical amendments. Most significant among these were:

- the codification of the fugitive disentitlement doctrine;
- the authority for the Attorney General to restore forfeited property in civil cases to victims;
- the correction of the criminal forfeiture provision for alien smuggling, 18 U.S.C. § 982(a)(7), to cross-reference the alien smuggling statute; and
- the incorporation of criminal forfeiture procedures necessary to make it possible to prosecute cases under the forfeiture provision for food stamp fraud.

Law enforcement at all levels remains strongly opposed to Rep. Hyde's civil forfeiture "reforms." Efforts to craft a compromise on that issue in 1997 were aborted when Rep. Hyde withdrew from the compromise and attempted to move his original proposal. Therefore, despite the evident need to update the 1986 money laundering law to address international money laundering and other developments, prospects for the enactment of any anti-money laundering legislation in 1999 are uncertain.

The only money laundering-related bill which was enacted this year was the Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. No. 105-310, 112 Stat. 2941 (1998). This bill, which was introduced by Congresswoman Velazquez of New York City, requires, for the first time, that the Department of the Treasury, in consultation with the Department of Justice, develop and implement a national strategy for combating money laundering and related financial crimes. For purposes of the bill and the strategy, the term "money laundering and related financial crime" means "the movement of illicit cash or cash equivalent proceeds into, out of, or through the United States, or into, out of, or through U.S. financial institutions." Thus, the strategy is to be directed only toward money laundering involving "illicit cash proceeds." The strategy must be submitted to Congress every February 1 for the next five years starting in 1999. Among the items to be included in the strategy are:

- comprehensive, research-based goals, objectives, and priorities for reducing money laundering and related financial crime in the United States;
- a description of operational initiatives to improve detection and prosecution of money laundering and related financial crimes and the seizure and forfeiture of proceeds and instrumentalities derived from such crimes;
- the coordination of regulatory and other efforts to prevent the exploitation of financial systems in the United States for money laundering and related financial crimes; and
- the enhancement of cooperative efforts between the Federal Government and state and local officials for financial crimes control.

In addition, the bill provides for the creation of "High-Risk Money Laundering and Financial Crimes Areas" ("HRMLA"), which shall be designated by the Secretary of the Treasury in consultation with the Attorney General. Under the bill, any head of a department, bureau, or law enforcement agency—including any state or local prosecutor—involved in the detection, prevention, and suppression of money laundering and related financial crimes can request that the Department of the Treasury designate an HRMLA or provide funding, with earmarked funds, for a "specific prevention or enforcement initiative." The Department of the Treasury, in turn, can designate an area to be HRMLA eligible for increased federal assistance or provide funding for prevention or enforcement anti-money laundering initiatives.

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

October 6, 1998

The Honorable Orrin Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Orrin:

I understand that tomorrow the Senate Judiciary Committee will be marking up the S. 2011, the "Money Laundering Enforcement and Combatting Drugs in Prison Act of 1998." My analysis of the bill and the proposed substitute amendment indicate that the measures contain numerous substantive changes to federal forfeiture laws and to money laundering laws that directly implicate forfeiture laws. As you know, I have a long-standing interest in curtailing abusive application of the federal civil forfeiture laws and I plan to bring reform legislation to the House floor in 1999. In this context, I must express my opposition to a number of the provision[s] contained in S. 2011 and the proposed substitute.

I am troubled by Congress making any substantive changes to federal forfeiture laws until fundamental reform is accomplished. Putting my generalized concerns aside, I have serious concerns with a number of the provisions in S. 2011 and the substitute that are likely to send the federal forfeiture regime further in the wrong direction. Specifically, I am strongly opposed to sections 102, 103, 104, 105, 107, 109, 110, 111, 112, 113 and 114 of S. 2011 as introduced and sections 3, 4, 5, 6, 8, 10, 11, 12, 13, 15, 16, 17, 21, 22, 23, and 25 of the proposed substitute. At the very least, these provisions should be the subject of full hearing and committee deliberation in both the House and the Senate. As this would be impossible in the waning days of the Congress, I would have no choice but to oppose legislation that contains any of these provisions.

I would respectfully request that the Senate Judiciary Committee not approve the foregoing provisions. I certainly look forward to working with you on forfeiture reform in the 106th Congress.

Sincerely,
/s/
Henry J. Hyde
Chairman

cc: The Honorable Trent Lott
The Honorable Patrick Leahy

Letters to the Editor

Section 4 of Justice's Money Laundering Bill

■ I am responsible for Restraint and Confiscation proceedings (what you would call asset forfeiture) in Northern Ireland and represent my Director on the Home Office Working Group on Confiscation, the function of which is to advise the Secretary of State on necessary amendments to the law in the United Kingdom on confiscation and money laundering.

I read with great interest Stefan Cassella's article, "Justice Submits Money Laundering Bill to Congress," in the January-June 1998 issue of the *Monitor* and wonder if I might pose some questions regarding it.

My interest is section 4 of the [b]ill proposed by the Department of Justice. It strikes me as a way to deal with money laundering in that, rather than simply asking a jury to look at circumstances which might give rise to suspicion, the proposal is to make certain suspicious factors in a transaction capable of giving rise to rebuttable presumptions. I would be grateful if you could assist me with answers to the following questions:

(i) What now happens to section 4 of the Department of Justice Bill, given that both the House Bill and the Senate Bill omitted section 4. Is section 4 now "dead in the water"?

(ii) Is section 4 a new approach to dealing with the difficult issues that arise for all of us involved in prosecuting money laundering (*i.e.*, bank secrecy law, and shell corporations) or has it been tried before?

(iii) Has there been any public comment, for example, by way of law journal articles, to the section 4 proposal?

(iv) Does the U.S. freedom of information legislation allow access to any Department of Justice policy position papers on the thinking that lies behind section 4?

I would be grateful for any assistance you could provide.

—*R.E. BELL*
Department of the Director of Public Prosecutions, Royal Courts of Justice, Belfast, Northern Ireland

Dear Mr. Bell,

Regrettably, Congress adjourned without taking any positive action on the Administration's anti-money laundering proposals. Accordingly, your questions regarding the bill we submitted, and regarding Section 4 in particular, may be moot. Nevertheless, I wanted to convey the following.

Section 4 of the Administration's proposal was an attempt to address the problem that occurs when couriers are intercepted carrying large quantities of U.S. currency in airports and on highways. In numerous cases, the circumstances surrounding the interception suggest strongly that the money is drug proceeds, yet the evidence may be insufficient to establish that fact in a court of law. Accordingly, we crafted a proposal to create a rebuttable presumption that more than $10,000 in U.S. currency constitutes drug proceeds if certain well-defined circumstances are found to exist.

Section 4, as you note, was not included in H.R. 3745, the money laundering bill introduced in the U.S. House of Representatives. However, Sen. Max Cleland of Georgia did introduce a bill that is based largely on the Administration's proposal. I am enclosing two statements of Sen. Cleland from the Congressional Record [see below] which I think answer your remaining questions regarding the purpose of the proposal and the manner in which it would work. The Department of Justice supports Sen. Cleland's bill and hopes that it will be re-introduced in the new Congress in 1999.

—*STEFAN D. CASSELLA*
Assistant Chief, AFMLS, Criminal Division

Excerpt from Sen. Cleland's remarks on the Drug Currency Forfeitures Act, 144 Cong. Rec. S9973-05 (daily ed. Sept. 8, 1998), 1998 WL 567464:
Mr. President, there have been a series of recent cases in which courts have ruled against one of law enforcement's most effective anti-drug tools—asset forfeiture. Just consider:

Law enforcement agents at an airport found almost $50,000 wrapped inside a pair of jeans. A drug dog responded positively to the presence of narcotics on the money, and the traveler, when confronted by the agents, produced a fake driver's license and offered other false evidence. *United States v. $49,576.00 in U.S. Currency*, 116 F.3d 425 (9th Cir. 1997).

In another instance, narcotics agents found $30,000 wrapped in bundles and stashed under the seat of a car. Despite the courier's demonstrably false explanation of the source of the money, the court nevertheless found insufficient evidence to establish probable cause for forfeiture. *United States v. U.S. Currency, $30,060.00*, 39 F.3d 1039 (9th Cir. 1994).

These are but two in a series of

cases in which the courts found circumstantial evidence sufficient to establish that the money was derived from some form of criminal activity, but insufficient to establish that the illegal activity involved drug trafficking. The courts therefore ruled that the money seized was not subject to forfeiture, and the proceeds were returned to the trafficker. *See also United States v. $13,570.00 in U.S. Currency*, 1997 WL 722947 (E.D. La. 1997) (seizure of cash at airport lacked probable cause despite dog sniff, evasive answers, fake identification, courier profile, and prior drug arrest); *United States v. $14,876.00 in U.S. Currency*, 1997 WL 722942 (E.D. La. 1997) (same); *United States v. $40,000 in U.S. Currency*, 999 F. Supp. 234 (D.P.R. 1998) (dog sniff, drug courier profile, quantity of currency, and evasive answers are not sufficient to establish probable cause where the [G]overnment fails to establish any connection between claimant and any drug trafficker).

Mr. President, these court decisions are coming at a time when drug sales in this country are generating $60 billion in illegal proceeds every year. Most of this drug money finds its way to drug kingpins in Mexico and Colombia. And the drugs find their way to Americans of all ages and walks of life. The consequences are devastating. Substance abuse is now the single largest preventable cause of death in this country, with illegal drugs and alcohol killing 120,000 Americans each year.

* * *

The transportation and transmission (by electronic means) of drug proceeds are enormous problems for law enforcement, but they also present law enforcement with an enormous opportunity. Because drug proceeds in the form of cash occupy much more space than the drugs themselves—often filling suitcases, vehicles, and even airplanes—the movement of the cash is often the most vulnerable part of the drug operation. Indeed, law enforcement agents are frequently successful in intercepting such cash shipments by stopping couriers at airports, opening containers at Customs checkpoints, and encountering cars stuffed with cash during routine traffic stops.

However, the ability of law enforcement to confiscate the money—and thus break the drug trafficking cycle—hinges on the [G]overnment's ability to establish that the money is, in fact, drug proceeds, and not the proceeds of some other form of unlawful activity. Therefore, today the distinguished chairman of the Senate Caucus on International Narcotics Control, Senator Grassley, and I are introducing the Drug Currency Forfeitures Act. Our bill enhances the ability of law enforcement agents to interdict and confiscate the huge quantities of drug money that are being moved through our airports, up and down our major highways, through our ports, and in and out of financial institutions here and abroad—while at the same time it upholds Fourth Amendment constitutional protections against illegal searches and seizures. Specifically, our bill would create a "rebuttable presumption" that money is subject to forfeiture as drug proceeds in cases involving drug couriers carrying large amounts of cash through drug transit areas, and in cases involving international money laundering. The presumption would apply if any of the following factors is established by the [G]overnment.

Factor one: There is more than $10,000 in currency being transported in one of the transit

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Unless otherwise stated, the articles represent the views of the individual authors, and not necessarily the Department of Justice. Nothing contained herein creates or confers any rights, privileges, or benefits for or on any claimant, defendant, or petitioner. *United States v. Caceres*, 440 U.S. 741 (1979).

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places commonly used by drug traffickers—for example, an airport, an interstate highway, or port of entry—and any of the following circumstances commonly associated with the transportation of drug proceeds exists: the money is packaged in a highly unusual manner; or the courier makes a false statement to a law enforcement officer or inspector; or the money is found in close proximity to drugs; or a properly trained dog gives a positive alert.

I note here that there has been much criticism of the use of drug dogs to interdict drug money, on the ground that so much currency now in circulation in the U.S. is tainted with drug residue that the drug dog's positive alert is meaningless. Let me say, however, that recent scientific research has refuted this notion and indeed supports the proposition that a drug dog's alert to currency is highly relevant in a forfeiture case. A study by Dr. Kenneth Furton, director of the Criminalistics Program in the Chemistry Department at Florida International University, has established that a properly trained drug dog does not alert to the cocaine residue on currency, but alerts instead to methyl benzoate—a highly volatile chemical by-product of the cocaine manufacturing process that remains on the currency only for a short period of time. Thus, even if it is true that a high percentage of our currency is contaminated with cocaine residue, the drug dogs are alerting only to money that has recently, or just before packaging, been in close proximity to a significant amount of cocaine. *See* K.G. Furton, Y.L. Hsu, N. Alvarez, and P. Lagos, "Novel Sample Preparation Methods and Field Testing Procedures Used to Determine the Chemical Basis of Cocaine Detection by Canines," *Forensic Evidence and Crime Science Investigation*, Proc. SPIE 2941, 56-62 (1997). I am attaching to my remarks an article describing Dr. Furton's work.

Factor two: The property subject to forfeiture was acquired during a period of time when the person who acquired it was engaged in a drug trafficking offense, and there is no other likely source for the money. I note that this presumption already exists in criminal forfeiture cases. *See* 21 U.S.C. § 853(d).

Factor three: The property was involved in a transaction that occurred, in part, in a bank secrecy jurisdiction or was conducted by, to, or through a shell corporation. These two factors appear repeatedly in cases involving international money laundering and therefore are highly indicative of illegal money laundering activity. However, to ensure that the presumption is focused narrowly on the problem this bill is designed to address, it would apply only where the money was being moved in or out of one of the countries the President has listed as a "major drug-transit country," a "major illicit drug producing country," or a "major money laundering country," all of which are defined terms in the Foreign Assistance Act.

Factor four: Any person involved in the transaction has been convicted of a drug trafficking or money laundering offense, or is a fugitive from prosecution for such an offense. This factor reflects the obvious fact that the movement of money by a convicted drug trafficker, money launderer, or fugitive is highly likely to involve drug proceeds.

The existence of any one of these four factors would be sufficient—by itself, or in some cases, in combination with the facts and circumstances which led to the seizure of the money—to establish probable cause to believe that the money represents drug proceeds, and if left unrebutted, would be sufficient to establish that the money is subject to forfeiture under the Controlled Substances Act, 21 U.S.C. § 881(a)(6), or the Money Laundering Control Act, 18 U.S.C. § 981(a)(1), by a preponderance of the evidence. The owner of the money, of course, would be free to rebut the presumption by submitting admissible evidence that the money was derived from a legitimate source, and the [G]overnment would have to respond either by impeaching the reliability of such evidence, or by offering admissible evidence of its own to support the forfeiture of the money. *See United States v. $129,727,000 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997). In this way, legitimate owners of untainted money will be protected. However, drug traffickers and money launderers will no longer be able to rely on the ambiguities inherent in the movement of cash and electronic funds—as well as the ambiguities inherent in the standard of proof in civil forfeiture law—to win the release of their ill-gotten gains without having to come forward with any evidence whatsoever.

On June 22, the Supreme Court handed down a highly controversial decision which is certain to have far-reaching ramifications on U.S. drug interdiction policy. That sharply divided ruling involved the case of Hosep Bajakajian, who had attempted to take $357,000 in undeclared cash to Syria, and who had lied about the amount of money he had with him when questioned by a Customs inspector. By ruling that the Federal Government cannot seize the money of a person trying to carry funds out of the country when that individual fails to declare it, unless the [G]overnment can show it is tainted money, the High Court's decision may very well reinforce the recent lower court decisions against forfeiture—a critically important weapon in our drug interdiction arsenal. Our bill would address these adverse court decisions by providing needed statutory guidance on the important and contentious issue of property subject to seizure.

Our bill has been endorsed by the Fraternal Order of Police, the International Association of Chiefs of Police, the International Brotherhood of Police Officers, and the Federal Law Enforcement Officers Association. I hope that my colleagues will support this bill.

Excerpt from Statement of Sen. Max Cleland on the Drug Currency Forfeitures Act, 144 Cong. Rec. S12223-03 (daily ed. Oct. 9, 1998), 1998 WL 701466: Mr. President, Mark Twain once said, "Get your facts first, and then you can distort them as much as you please." There has been some distortion and misinformation about my bill, the Drug Currency Forfeitures Act, and I appreciate the opportunity to discuss the facts.

First of all, the purpose of my bill is to dismantle the fortunes of drug traffickers by helping law enforcement seize their drug profits. It is all about confiscating the money of drug dealers, drug traffickers, and drug kingpins. It is NOT about seizing the money of innocent, law-abiding citizens, as some have charged. Confiscating the money of innocent citizens violates the Fourth Amendment of the Constitution, and I would oppose such an attempt with every effort at my command. That is why this legislation includes constitutional safeguards which protect innocent Americans against illegal searches and seizures.

Mr. President, let me tell you why I introduced my bill. There have been a recent series of court cases which have handed down some very disturbing verdicts. In each case, despite overwhelming evidence to the contrary, the court ruled against seizing the assets of drug traffickers—one of our most effective weapons in the war against drugs. Let me give you just one example.

A traveler was stopped in an airport carrying almost $14,000 in cash. A trained drug dog responded positively to the presence of drugs on the money. When asked for an explanation, the drug courier produced a fake ID and lied about the money's source. He also had a previous drug arrest on his record. Yet despite the evidence, the court gave the money back to the trafficker. Why? The court ruled there was sufficient evidence to show that the money came from some kind of criminal activity. But the court held there was insufficient evidence to prove that the crime was drug trafficking. *United States v. $13,570.00 in U.S. Currency*, 1997 WL 722947 (E.D. La. 1997).

Every year drug sales in this country generate $60 billion in drug profits. Every day drug couriers move huge quantities of this multi-billion-dollar pot out of the U.S. in loads big enough to fill suitcases, trucks, and even airplanes. This movement of drug kingpins' cash crop is the most vulnerable part of their drug operation. Yet current law allows the drug trafficker and his couriers to say nothing at all when their money is seized. That's right, Mr. President. Under the law, the drug trafficker is obliged to give no explanation at all as to where his money came from. If the [G]overnment can only show that the money was involved in a crime—but can't show that it was a drug crime—the drug dealer gets his money back.

My legislation proposes a presumption that the money is drug proceeds if certain clearly defined circumstances are

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present—circumstances which typically are found in drug trafficking cases: the presence of drugs or drug residue; a positive alert by a properly trained dog; packaging of the money in a suspicious and highly unusual manner; false statements made to the police; previous drug trafficking convictions.

Let me take just a moment, Mr. President, to answer those critics who discount the positive alert by a properly trained dog. These critics say that so much of our currency is tainted with drug residue that a positive dog alert is meaningless. Yet these critics fail to take into account the scientific evidence that shows that the drug dogs are NOT alerting to the presence of cocaine—which may or may not contaminate a large fraction of all U.S. currency. Instead, the scientific evidence shows that the dogs are alerting to methyl benzoate, a highly volatile chemical by-product of the cocaine manufacturing process that remains on the currency only for a short period of time. The bottom line is that the dogs are alerting only to money that has recently, or just before packaging, been in close proximity to a significant amount of cocaine. This research explains why these dogs do not routinely alert to currency.

To repeat: These clearly defined circumstances in my bill are safeguards to protect the innocent. More important, my bill establishes only a presumption that the money is drug money. Individuals have every opportunity to rebut the [G]overnment's claim and get their money back. Criminals, however, will no longer be able to play dumb and recover their drug money without having to provide an explanation of where that money came from.

To those critics who maintain that my bill violates the rights of innocent citizens, let me say loud and clear: My bill takes effect only AFTER a determination has been made that the money in question is from an illegal source. This is how the process works.

A police officer or federal agent assigned to an airport task force seizes the money of a traveler based on "probable cause." The traveler, for example, has exhibited suspicious, counter-surveillance behavior, such as signaling to seemingly unrelated travelers who, in fact, are traveling with him. He has concealed a large quantity of money in his carry-on bag along with odor-disguising items like fabric softener sheets to throw off the drug dog. He produces a fake ID and offers a false explanation for the money. Someone whose name he doesn't remember packed the bag, and he had no idea there was any money in it.

Let me repeat: There must be probable cause for the [G]overnment to seize the money. Once the money is seized, notice of the seizure must be published in the newspaper on three successive weeks and direct notice must be given, in writing, to the person from whom the money was seized as well as to any other person known to have a potential legal interest. The notice explains the procedure for filing a claim to the money. In 85 percent of all federal cases, no one files a claim. To my critics, let me repeat: In 85 percent of the cases, the individual never contests the seizure.

If an individual does file a claim, the agency which has seized the money must refer the case to the United States Attorney, who then makes an independent determination of the merits of the case. If the U.S. Attorney does not believe the [G]overnment can establish that the money was drug proceeds, the case is rejected and the money is returned. On the other hand, if the U.S. Attorney believes the case has merit, he or she must file a civil forfeiture complaint in federal district court. The claimant is granted a certain number of days to renew his claim and file an answer to the [G]overnment's complaint.

The case is then litigated in the district court. In each and every case, the burden of proof is on the [G]overnment. In each and every case, the [G]overnment has the burden of establishing—to the satisfaction of the district court—that there is probable cause to believe that the money is drug money and therefore subject to forfeiture. Only if the [G]overnment successfully overcomes this hurdle is the case scheduled for a jury trial where the claimant is required to offer his explanation for the legitimate source of the money. If the jury accepts this explanation, and the

[G]overnment is unable to rebut it with admissible evidence, the claimant will prevail and will recover the money. Otherwise, the court will enter judgment for the [G]overnment and order the forfeiture of the money.

Mr. President, the federal forfeiture laws are carefully written to provide due process to the innocent and the guilty alike. My bill conforms to these high standards while closing a legal loophole that benefits only the guilty. In the court cases which my bill addresses, the cases are dismissed before the claimant ever has to go before a jury to explain the source of the money. My bill addresses this problem by creating a presumption that if certain factors are present, the money is drug proceeds, and thereby allows the case to move forward to the next stage.

To those who have expressed concern with the concept of rebuttable presumption, let me emphasize this fact: The presumption does not lead inevitably to the forfeiture of the money. Its role is only to force the claimant to come forward with an explanation for a legitimate source of the money. Therefore, my bill in no way infringes upon a property owner's rights under law.

To those who have expressed concern over the possible impact of my bill, let me cite these facts: In fiscal year 1995—a time period prior to most of the court decisions which have limited the use of drug asset seizures—the FBI, the Drug Enforcement Administration, and the Immigration and Naturalization Service made 35,000 seizures of forfeitable property. Of the 35,000 cases, more than 85 percent were uncontested. Of the 5,250 contested cases, the U.S. Attorney declined to prosecute 3,057. Of the 2,193 complaints filed, the [G]overnment lost in only 48 cases. These statistics are similar for the prior three years. There is, therefore little evidence of actual abuses of drug asset forfeitures in the past, and there is even less likelihood of such abuses under the enhanced safeguards in my proposal.

In closing, let me state once again: The Drug Currency Forfeitures Act goes after drug money only. Drug trafficking is a business, and drug traffickers are in this business for one reason—money. Their multibillion-dollar war chests allow drug lords to have some of the world's most sophisticated airplanes, boats, and communications equipment. Because of their war chests, drug cartels possess weapons in quantities that rival the capabilities of some legitimate governments. If we want to make our streets safer, if we hope to make our children's lives drug-free, it is not enough just to apprehend the drug trafficker. Throw the drug kingpin in jail, and he continues his drug operations from behind prison walls. As evidence, just look at the leaders of the most powerful international organized crime group in history: Colombia's notorious Cali cartel. Even now, the Rodriguez-Orejuela brothers are able to run their drug trafficking business from prison through the use of private quarters and telephones.

Critics of my proposal talk about the need to protect innocent victims. If we want to talk about innocent victims, look at the children who are being sold drugs at increasingly younger ages.

Mr. President, I'm proud to be the sponsor of the Drug Currency Forfeitures Act. It hits the drug cartels where it hurts the most: their wallets. The ability of law enforcement to confiscate drug money hinges on the [G]overnment's ability to prove that the money is drug proceeds, and not the proceeds of some other form of unlawful activity.

My bill is endorsed by the Fraternal Order of Police, the International Association of Chiefs of Police, the International Brotherhood of Police Officers, and the Federal Law Enforcement Officers Association. The Drug Currency Forfeitures Act closes a legal loophole that benefits only the guilty. At the same time, it upholds the Constitution's Fourth Amendment, which protects the innocent against unlawful searches and seizures. I worked very closely with the Department of Justice in crafting this legislation. It is a positive—and needed—step forward, and at the appropriate time I urge my colleagues to support this measure.

Letters to the Editor . . .

Send your comments or suggestions to:

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Drug Money Weighs 10 Times More Than Drugs Sold

In her congressional testimonies over the past two years, Deputy Assistant Attorney General Mary Lee Warren stressed that drug traffickers must contend with heavy volumes of cash, which are recirculated into the U.S. financial system or shipped overseas. The following chart illustrates the problem by comparing the weight of illicit drugs that must be sold to generate a specified sum of money with the weight of the currency that the criminal now must recirculate or dispose of.

Note that the cash weight generated by the street sale of drugs can be more than ten times the weight of the drugs sold, *i.e.*, 22 pounds of heroin generates 256 pounds of street cash, based on the weight of $5's, $10's, and $20's.

Street Value of Illicit Drugs . . .

Crack	Cocaine	Heroin	Value
2.2 lbs.	4.4 lbs.	2.2 lbs.	$100,000
22	44	22	1 Million
220	440	220	10 Million
2,200	4,400	2,200	100 Million
22,000	44,000	22,000	1 Billion
2,200,000	4,400,000	2,200,000	100 Billion

. . . Generates the Weight of Drugs Sold

Value	$5 Bills	$10 Bills	$20 Bills	$100 Bills
$100,000	44 lbs.	22 lbs.	11 lbs.	2.2 lbs.
1 Million	440	220	110	22
10 Million	4,400	2,200	1,100	220
100 Million	44,000	22,000	11,000	2,200
1 Billion	440,000	220,000	110,000	22,000
100 Billion	22,000 tons	11,000 tons	5,500 tons	1,100 tons

Submit Money Laundering Contact Name to AFMLS

By Lester M. Joseph, Assistant Chief, AFMLS, Criminal Division

In her October 30, 1997 letter to all U.S. Attorneys (USAs) on the subject of "Targeting Cash Proceeds Money Laundering," Attorney General Janet Reno requested that every USA identifies a "cash proceeds money laundering contact" for their district and submits this information to the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division. This designated contact will provide money laundering information to AFMLS, and in turn, AFMLS will disseminate this information to the field as well as share the information with each contact.

Not all districts have complied with this request. For any district which has not yet designated a "cash proceeds money laundering contact," AFMLS requests that this designation be made as soon as possible and that the name, title, fax and telephone numbers, and e-mail address of this contact be sent to AFMLS Chief Gerald E. McDowell:

Fax: (202) 514-5522

E-mail: CRM20(gmcdowel)

SARS: A Nationwide System is Now in Place

By Scott Lodge, Special Agent, SAR Project Office, FinCEN, Department of the Treasury

The following information was extracted from *1st Review of Suspicious Activity Reporting System (SARS)*, published by FinCEN. The full report is available on the Internet at:
http://www.treas.gov/fincen/sarptfin.html.
You may also request a copy in writing from FinCEN's Office of Communications, 2070 Chain Bridge Road, Suite 200, Vienna, VA 22182, or fax your request at (703) 905-3885.

The Suspicious Activity Reporting System (SARS), created by the five federal financial supervisory agencies and the Financial Crimes Enforcement Network (FinCEN), is now two years old. SARS has processed approximately 150,000 reports of suspicious activity submitted by depository institutions. Those reports are available electronically, in their entirety, to the system's builders, to five federal law enforcement agencies, 52 state and territorial law enforcement agencies, and 25 state bank regulators.

The development and operation of SARS is a special responsibility and a special challenge. SARS was designed to be the centerpiece of a new approach to using the Bank Secrecy Act (BSA) to fight financial crime, and involved an unparalleled attempt to build an explicit and continuous data flow about potentially serious activity among: (1) depository institutions detecting that activity; (2) the five federal financial supervisory agencies (Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration), and the Department of the Treasury's FinCEN; and (3) law enforcement officials throughout the United States.

Under the system, FinCEN is designated as the single filing point for suspicious activity reports and is responsible for distributing the information within the Government. In addition, FinCEN is responsible for analyzing this information and providing the resulting intelligence to investigators, regulators, and the banking industry.

Background and Purpose of SARS

Depository institutions are required to file suspicious activity reports by the authority of the Secretary of the Treasury under the BSA to: require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation, and general supervisory authority of the five federal financial supervisory agencies. Each supervisory agency issued rules under its own authority that make SAR filings mandatory.

The implementation of SARS achieved several important objectives:

- to create one form, adopted by all agencies involved, that can be forwarded to a single collection point to satisfy all applicable filing requirements;
- to use a single, centralized database system so that information can be simultaneously made available to the federal financial supervisory agencies;
- to provide federal and state law enforcement officials with access to this same database, making the information available quickly;
- to provide information about the types of financial crimes affecting depository institutions nationwide and the manner in which government agencies respond to these reports; and
- to provide an ability to understand patterns of suspicious activity—or at least activity thought by bank officials to be suspicious—so that the Government can alert banks to emerging patterns of white-collar crime.

On a more fundamental level, SARS reflects the philosophy that suspicious transaction reporting is central to counter-money laundering policy, both in the United States and abroad. Officials at financial institutions are more likely than government officials to have a sense as to which transactions appear to lack commercial justification or otherwise cannot be explained as falling within the usual methods of legitimate commerce. Under those circumstances, simply relying on currency transaction reporting is neither adequate nor cost-effective for the institutions involved or the Government. The change in emphasis moves the enforcement focus from reporting all routine currency transactions above a certain amount to reporting information most likely to be useful to law enforcement officials and financial regulators. SARS, then, is a key

*See **SARS**, page 35*

Mule Train: FBI Sting Operation Targets a Check Cashing Business

By Jay Bienkowski, Supervisory Special Agent, Economic Crimes Unit, Financial Crimes Section, Criminal Investigative Division, Federal Bureau of Investigation

On July 1, 1998, the CEO, president, and vice-president of Supermail International, Inc. were arrested on money laundering charges stemming from a two-year investigation conducted by the Federal Bureau of Investigation's (FBI's) Los Angeles office and the Los Angeles Police Department (LAPD). The three executives, along with six other employees and associates, were arrested after a federal grand jury returned a 67-count indictment against 11 defendants, including the Supermail corporation, charging multiple conspiracies, money laundering, evading currency reporting requirements, aiding and abetting, and criminal forfeiture.

According to corporate filings, Supermail International, Inc. is one of the largest check cashing enterprises operating in the western United States, and purports to be one of the leading U.S. money transfer agents providing services to Mexico and Latin America, with its stock traded on the NASDAQ OTC Bulletin Board. Supermail is considered a giant among the increasing number of independent non-bank financial institutions operating in rally inner-city neighborhoods where banks have reduced their presence.

The arrests represent the culmination of a two-year Organized Crime Drug Enforcement Task Force investigation, during which the FBI and LAPD conducted a money laundering "sting" operation code named "Operation Mule Train." The operation targeted a check cashing business, also known as a *casa de cambio*, in the San Fernando Valley area of Los Angeles, which task force members believed was laundering the narcotics proceeds of Mexican drug trafficking groups. The primary target was a Supermail store in Reseda, California.

During the course of the undercover operation, investigators penetrated the business by approaching the manager of the Reseda store, who agreed to launder "drug" money in exchange for a cash fee. Specifically, the manager converted large amounts of cash into money orders issued by Supermail. As larger sums were laundered, the manager sought the assistance of his associates working at other store locations. When a new manager took over operations at the Reseda store in April 1997, he brought in Supermail's corporate officers, including the CEO, the president, and the senior vice-president. Pocketing the cash fee, the corporate officers authorized the issuance of money orders and wire transfers of large sums of "drug" money to a covert bank account in Miami, Florida, while the cash was used to maintain operations at the Supermail stores. To avoid detection by law enforcement, no currency transaction reports (Form 4789) or suspicious activity reports (SARs) were filed for any of these transactions, and they never requested identification.

In total, the defendants laundered over $3.2 million of "drug" money. The investigation is believed to be one of the largest money laundering "sting" operations targeting a check cashing business in U.S. history.

Other FBI News

New Investigative Tool: The FBI has reviewed and analyzed SARs (formerly Criminal Referral Forms) *filed* by financial institutions for many years. Almost 50 percent of all SARs involve money laundering or structuring. A relatively new investigative tool being adopted in different regions of the country is the SAR review team concept. Agents from different law enforcement agencies and members from the U.S. Attorney's Office meet periodically to evaluate the money laundering SARs and to determine which agencies, if any, will open an investigation.

Training: The FBI's Money Laundering Unit conducted one money laundering in-service in April 1998. The Money Laundering Unit is planning another in-service from January 4-8, 1999. This in-service will focus on money laundering trends and methods, the law, and investigative techniques.

MLCC Identifies Trends, Methods in Money Laundering Investigations

By Gregory Wiest, Senior Special Agent, Money Laundering Coordination Center, Office of Financial Investigations, U.S. Customs Service

The Money Laundering Coordination Center (MLCC) was created in 1996 by Allan J. Doody, director, Office of Financial Investigations, in Washington, D.C., for the purpose of supporting active money laundering investigations within the U.S. Customs Service (USCS). The MLCC serves as the centralized clearinghouse for both domestic and international money laundering pickup operations within the Office of Investigations (OI). All money laundering pickup information collected by the MLCC is counted and stored in the MLCC database for the purpose of identifying relationships, methods, and trends that exist between past, current, and future money laundering investigations occurring in a number of geographical locations.

In 1997, the Financial Investigations Division, in conjunction with Financial Crimes Enforcement Network (FinCEN), developed the MLCC database. The primary goal of the MLCC is to provide investigative support to the field offices through a centralized database to track money laundering pickup operations that will allow field offices within the OI to exchange information in a timely manner. Access to the MLCC database will be granted to those field offices which have a certified financial undercover operation and to select Customs attaches.

Personnel assigned to the MLCC currently work with other federal law enforcement agencies to identify other agencies targeting identical subjects and/or organizations.

The MLCC database provides a number of benefits to the field in the collection of information, most important, agent safety. The MLCC database will afford undercover agents the opportunity to access the system to determine if violators have been identified by other offices prior to undercover meetings. Furthermore, the information would include historical data on the violator, *i.e.*, criminal histories, photographs, addresses, vehicles, and wire transfer information.

The MLCC database will afford undercover agents the opportunity to . . . determine if violators have been identified by other offices prior to undercover meetings.

The MLCC will also prove beneficial in the identification of new money laundering methodologies and trends. The MLCC currently has one special agent and two intelligence research specialists who analyze incoming data on a routine basis, query the information through a host of law enforcement and commercial databases, and utilize the artificial intelligence capabilities at FinCEN. The MLCC then provides that intelligence to the originating field office, as well as all other corresponding field offices identified.

Intranet for MLCC Access

FinCEN is currently in the process of developing the Secure Outreach Program which will provide Treasury law enforcement agencies access to a number of databases through a secure Intranet web site. The USCS, in cooperation with FinCEN, is scheduled to make the MLCC accessible to field offices during January 1999. The Secure Outreach Program is a Virtual Private Network that will allow USCS field offices to send, receive, or analyze data from pickup operations on a real-time basis in a safe and secure environment. Additionally, OI offices will have the ability to establish secure networks with a number of other offices through the utilization of secure e-mail. As the MLCC is brought online with the field, one of the goals is to provide OI with the latest technology, and to use that technology to our greatest advantage. The integrity of the Secure Outreach Program will be certified by both the Department of the Treasury and the National Security Agency. For further information, contact Acting Program Manager Gregory Wiest at (703) 905-3987.

Arizona Court of Appeals Affirms State's Money Laundering Statute

By Cameron H. Holmes, Unit Chief, Financial Remedies Unit, Arizona Attorney General's Office

The Arizona Court of Appeals has found that one of the two optional scienter requirements of Arizona's money laundering offense, having "reason to know" that the property in question is the proceeds of some offense, gives adequate notice of the conduct that it prohibits and is therefore not unconstitutionally vague. It gave the phrase a broad reading, equating the test with criminal negligence.

The defendant in *State v. Lefavre*, No. 1 CA-CR 97-0158 (July 21, 1998), was a member of a local land-use planning authority and a vocal opponent of commercial development. A developer needed approval for a large development from the authority on which the defendant sat. In the course of the developer's effort to get approval, he opened a bank account in a business name other than the developer's corporate name, but funded through the corporation. The defendant was given authority to withdraw monies from the account. About $30,000 was placed into the account over the next ten months, much of which was withdrawn by the defendant and used for her personal expenses. The developer and the defendant were tried together for bribery and money laundering. The jury disbelieved their testimony that the money represented an advance finder's fee for the defendant's assistance in the sale of a separate parcel of land belonging to the developer. The jury convicted the developer of bribery. It acquitted the defendant of bribery but convicted her of money laundering for her receipt of the money into the account. She appealed on the ground that the statute does not give fair notice of the conduct prohibited or adequate guidance for adjudication of guilt.

The Arizona money laundering statute, Arizona Revised Statutes (A.R.S.) § 13-2317, enacted in 1985 as the first money laundering statute in the nation, currently makes it a violation if a person:

1. acquires or maintains an interest in, transacts, transfers, transports, receives, or conceals the existence or nature of racketeering proceeds knowing or having reason to know that they are the proceeds of an offense;
2. makes property available to another by transaction, transportation, or otherwise knowing that it is intended to be used to facilitate racketeering; or
3. conducts a transaction knowing or having reason to know that the property involved is the proceeds of an offense and with the intent to conceal or disguise the nature, location, source, ownership or control of the property or the intent to avoid a transaction reporting requirement under title 6, chapter 12 [relating to reports similar to federal CTR and IRS Form 8300 reports].

The defendant was convicted under a former provision that is now found in present paragraph 1. The defendant pointed out that her acquittal of bribery indicated that the jury may have convicted her not of "knowing" conduct but only under the second "having reason to know" option. The court accepted this. It further accepted her submission that the statute does not limit those circumstances under which a person is presumed to have "reason to know" that the questioned funds are proceeds of an offense.

The court observed that "having reason to know" is commonly used as a *mens rea* for criminal liability, citing several Arizona statutes and *United States v. Wuliger*, 981 F.2d 1497, 1504 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191 (1994). It found, slip op. at 9:

> Contrary to Defendant's claim that the phrase equates with strict liability, "having reason to know" is in fact akin to criminal negligence. *See, e.g.*, Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law*, § 3.4(a) (1986) (describing the phrase "having reason to know" as similar to the terms "negligently" or "carelessly" in "indicating a requirement of fault, but not necessarily mental fault"). Thus, in addition to encompassing those defendants who knowingly deal with racketeering proceeds, A.R.S. [§] 13-2317 also applies to those who, under an objective standard of reasonableness, had "reason to know" that they were dealing with the proceeds of an offense. *See id.* ("having reason to

know" establishes an objective standard of guilt and Defendant is guilty if a reasonable person would have known the relevant fact).

The court noted that this is more inclusive than the federal money laundering statute, but described this as a policy issue not relevant to the statute's constitutionality, and went on to hold that allowing the jury to determine the reasonableness of the defendant's conduct and state of mind does not make it too vague to afford a practical guide to permissible conduct, citing *United States v. Ragen,* 314 U.S. 513, 523 (1942). It affirmed the defendant's conviction.

Arizona prosecutors predict that the opinion will be felt primarily in the application of civil remedies to ongoing criminal conduct. Money laundering is a "racketeering" predicate under Arizona law. A violation has effects similar to "racketeering" predicates under the federal racketeering statutes, except that there is no enterprise requirement and no pattern element under Arizona law, so a single act of racketeering supports a civil action for disgorgement, costs of investigation and prosecution, treble damages, and forfeitures.

A money laundering defendant's claim of noninvolvement is most sympathetic to jurors in a criminal context. Jurors are often confronted with a group of clearly associated criminals and one or two codefendants charged with money laundering, whose defense is that they are not core group members and therefore do not really belong in the same picture as the others at the defense table. In the criminal context this is an effective argument because jurors are reluctant to imprison the "mere" facilitator. The defense is often, "I may have had some clues about what was going on, but I did not actually know it for sure." This holding that the Government may prevail on a finding of criminal negligence allows the Government to agree with this defense, or even preempt it by assuring the jury that this lesser degree of moral culpability is all the Government is alleging. Moreover, in the civil context, the issue is not whether the facilitator should be in prison but whether the facilitator should be allowed to benefit from the racketeering conduct.

The consequences for the money launderer could be substantial, particularly in light of the developing case law under which a money launderer is jointly and severally liable for the damages caused by acts in furtherance of an enterprise or conspiracy of which the money launderer is a member, to the extent that the acts were foreseeable to the money launderer. *See, e.g., United States v. Wilson,* 742 F. Supp. 905 (E.D.Pa. 1989), *aff'd,* 909 F.2d 1478 (3d Cir.), *cert. denied,* 498 U.S. 1016 (1990) (four conspirators jointly and severally liable for the entire gross proceeds of the illegal enterprise); *United States v. Saccoccia,* 823 F. Supp. 994, 1004 (D.R.I. 1993), *aff'd sub nom. United States v. Hurley,* 63 F.3d 1, 22 (1st Cir. 1995) (in conspiracy that laundered $136,344,231 in cocaine proceeds, the court held that, for purposes of 18 U.S.C. § 1963(a)(3), "a defendant should be deemed to have obtained amounts obtained by coconspirators in furtherance of the conspiracy to the extent that receipt of those amounts was reasonably foreseeable," stated that "holding otherwise would defeat the overriding purpose of RICO forfeiture which is to deprive those engaging in racketeering activity of the fruits of their illegal conduct," and observed that "[i]n most cases, it would be a practical impossibility to determine the precise amount of each conspirator's share in the conspiracy's criminal proceeds"); *United States v. DeFries,* 909 F. Supp. 13, 20 (D.D.C. 1995) ("[j]oint and several liability or, in other words, vicarious forfeiture liability of one RICO conspirator for some or all of the proceeds generated or received by others, is essential to give assurance that leaders share liability for proceeds handled by their subordinates, but no defendant should be held liable for proceeds he could not reasonably have anticipated as likely to derive from their concerted efforts" . . . "joint and several liability is an integral aspect of RICO forfeiture").

The Arizona money laundering statute served as the model for the President's Commission Model Money Laundering Act, now being promulgated by the National Alliance for Model State Drug Laws. The Model Act, however, deleted the "reason to know" option found in title Arizona statute, leaving only the "knowing" standard in the Model Act. Perhaps this case will encourage states adopting the Model Act to include the "reason to know" language, at least as an option supporting civil liability. Prosecutors interested in encouraging the adoption of the Model Act or in getting a copy of it may contact Sherry Green, Director of the National Alliance for Model State Drug Laws, at (703) 836-6100.

Money Laundering Articles Needed

Possible Topics

- Has your agency undergone any *policy changes*?
- Are there any *cases* or a variety of cases you would like to highlight?
- Have you encountered any *problems* (or concerns) with a money laundering case?
- Have there been any new *investigation tools* used by your agency in a recent money laundering case?
- Have there been any money laundering *training seminars* or *conferences* conducted by your agency?
- Are there any new money laundering *publications* that your agency has produced?
- Has your office held any money laundering *working group meetings*?
- Does your office have any *new government employees*?

Please Contact:
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Send black and white photos with your articles!

Customs Takes Down Major Drug Traffickers in *Operation Casablanca*

By Beth Weaver, Public Affairs Office, Department of the Treasury, and Michael Gordon, Attorney, Civil Division, Department of Justice

Treasury Secretary Robert E. Rubin and Attorney General Janet Reno announced in May of this year the culmination of the largest, most comprehensive drug money-laundering case in the history of U.S. law enforcement, representing the first time in which Mexican banks and bank officials have been directly linked to laundering the Cali and Juarez cartels' U.S. drug profits.

The nearly three-year undercover operation, known as *Operation Casablanca*, was led by the U.S. Customs Service (USCS) in cooperation with federal, state, and local agencies. The investigation spans six countries and resulted in 112 arrests and seizures of $35 million dollars in illegal proceeds from drug money laundering and more than two tons of cocaine and four tons of marijuana.

"By infiltrating the highest levels of this international drug trafficking financial infrastructure, Customs was able to crack the elaborate financial schemes the drug traffickers developed to launder the tremendous volumes of cash acquired as proceeds from their deadly trade," said Secretary Rubin. "... [W]e have hurt the drug cartels where it hurts the most—in their pocket books."

Indictments were unsealed on May 18, 1998, in the U.S. District Court in Los Angeles, California. One indictment charges 26 Mexican bank officials and three Mexican banks—Confia, Bancomer, and Banca Serfin. Both Bancomer and Banca Serfin have branches in the United States.

The indictment alleges that officials from twelve of Mexico's 19 largest banking institutions were involved in money laundering activities. Bank employees were implicated in meetings with undercover law enforcement officials. The second and third indictments cover money launderers from the Juarez and Cali cartels.

Since May 16, 1998, Customs agents and other assisting law enforcement officers have arrested 14 Mexican banking officials, as well as 14 members of the Juarez cartel of Mexico and two members of the Cali cartel.

"We set out to disrupt the money laundering networks that fuel the international drug trafficking trade, and we succeeded," said Attorney General Janet Reno. "*Operation Casablanca* built a road map that tracked the structure of the international drug cartels from the kingpins to the couriers and the bankers in between."

Operation Casablanca was initiated in November 1995, when the USCS Los Angeles office learned that drug cartel members were laundering proceeds of U.S. drug sales through branches of Mexican banks along the border. The investigation expanded to include the financial infrastructure of the Juarez cartel, including Victor Alcala Navarro, its money manager, and Jose Alvarez Tostado, a principal in the Juarez cartel.

During the course of this investigation, undercover agents posed as middlemen for cartel brokers and bankers who agreed to launder their funds. The bankers would establish bogus accounts and use bank drafts to dodge money laundering regulations.

The investigation found that nearly 100 U.S. bank accounts were used in the money laundering activities by the drug traffickers and their corrupt banking partners. To date, no evidence has been found that officials from those U.S. banks were aware of the source of the money that was transferred from Mexican to U.S. banks. At the conclusion of *Operation Casablanca*, U.S. Customs agents reasonably expect to seize $110 million from Mexican investment accounts and other accounts at U.S. banks used by the traffickers.

These bank accounts can be forfeited under federal laws as proceeds and means of facilitation of the drug trafficking and money laundering and as assets of the criminal enterprises.

The Federal Reserve has provided crucial assistance to federal agents and prosecutors throughout this lengthy investigation. In May 1998, the Federal Reserve initiated enforcement actions against those foreign banks under the Federal Reserve's supervision involved in this investigation. These actions will require the banks to ensure that there is no recurrence of money laundering in their banks.

The case is being prosecuted by the U.S. Attorney's Office for the

See ***Casablanca****, page 19*

MLATs Entered into Force

As of November 15, 1998, the following U.S. Mutual Legal Assistance Treaties (MLATs) have been signed and entered into force:

MLAT with	Signed	Entered into Force	Citation (if any)
Argentiina	Dec. 4, 1990	Feb. 9, 1994	
Austria	Feb. 23, 1995	Aug. 1, 1998	
Bahamas	Aug. 18, 1987	July 18, 1990	
Canada	March 18, 1985	Jan. 24, 1990	
Cayman Islands	July 3, 1986	Mar. 19, 1990	
Hungary	Dec. 1, 1994	Mar. 18, 1997	
Italy	Nov. 9, 1982	Nov. 13, 1985	
Jamaica	July 7, 1989	July 25, 1995	
Mexico	Dec. 9, 1987	May 3, 1990	
Morocco	Oct. 17, 1983	June 23, 1993	
Netherlands	June 12, 1981	Sept. 15, 1983	TIAS 10734
Panama	Apr. 11, 1991	Sept. 6, 1995	
Philippines	Nov. 13, 1994	Nov. 22, 1996	
South Korea	Nov. 23, 1993	May 23, 1997	
Spain	Nov. 20, 1990	June 30, 1993	
Switzerland	May 25, 1973	Jan. 23, 1977	27 UST 2019
Turkey	June 7, 1979	Jan. 1, 1981	32 UST 3111
Thailand	Mar. 19, 1986	June 10, 1993	
Uruguay	May 6, 1991	Apr. 15, 1994	
United Kingdom	Jan. 6, 1994	Dec. 2, 1996	

The U.S. Cayman Island MLAT was extended to Anguilla, the British Virgin Islands, and the Turks and Caicos Islands on November 9, 1990, and to Montserrat on April 26, 1991. Twenty additional MLATs have been signed, but are not yet in force, with*:

MLAT with	Signed	MLAT with	Signed
Antigua-Barbuda	Oct. 31, 1996	Belgium	Jan. 28, 1988
Australia	Apr. 30, 1997	**Brazil**	Oct. 14, 1997
Barbados	Feb. 28, 1996	**Czech Republic**	Feb. 4, 1998

MLAT with	Signed	MLAT with	Signed
Colombia	Aug. 20, 1980	Nigeria	Sept. 9, 1989
Dominica	Oct. 10, 1996	Org. of American States	Jan. 10, 1995
Egypt	May 3, 1998	Poland	July 10, 1996
Estonia	Apr. 2, 1998	**St. Kitts-Nevis**	Sept. 18, 1997
Grenada	May 31, 1996	**St. Lucia**	Apr. 18, 1996
Hong Kong	Apr. 16, 1997	**St. Vincent**	Jan. 8, 1998
Israel	Jan. 26, 1998	**Trinidad-Tobago**	Mar. 6, 1996
Latvia	June 13, 1997	Ukraine	July 22, 1998
Lithuania	Jan. 16, 1998	**Venezuela**	Oct. 12, 1997
Luxembourg	Mar. 13, 1997		

* **Bold** text indicates a new treaty approved by the U.S. Senate on October 21, 1998.

People and Places . . .

. . . Doody is Newly-appointed Boston SAC

Director *Allan J. Doody*, Financial Investigations Division, at U.S. Customs Service's (USCS's) headquarters will be leaving Washington, D.C., in January 1999 to serve as the newly-appointed special agent-in-charge (SAC) in Boston, Massachusetts. In his new position, he will be in charge of USCS investigations for all of New England. Mr. Doody transferred to headquarters from the SAC/Los Angeles office in 1993 where he served as the assistant special agent-in-charge.

As the director of the Financial Investigations Division, Mr. Doody had programmatic oversight of USCS's money laundering strategy and was responsible for the development of the Money Laundering Coordination Center (MLCC), *see* article at 14. In addition, Mr. Doody oversaw the *Operation Casablanca* investigation (*see* article at 17), which has been lauded as the largest money laundering investigation ever conducted.

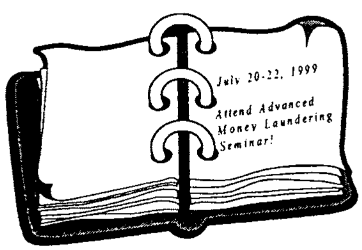
Operation Casablanca

Casablanca, from page 17

Central District of California. The efforts of the Drug Enforcement Administration, the U.S. Attorney's Offices in Chicago, New York, and Miami, and the Asset Forfeiture and Money Laundering Section, Criminal Division, have also been integral to the case.

Advanced Money Laundering Seminar
July 20-22, 1999, in Columbia, South Carolina

Topics covered? Policy and case law, trends in money laundering, regulatory updates, investigative techniques, corporate liability, charging decisions, sentencing/restitution, and ethics.



Interested in attending? AUSAs and agency attorneys should look for the official Office of Legal Education/ AFMLS seminar announcement in May 1999, which will provide the required nomination information.

Questions? Contact AFMLS Attorney Nancy Martindale at (202) 514-3963.

Anti-money Laundering Training for Colombian Unit

By Jeff Ross, Special Assistant, Office of the Deputy Assistant Attorney General, Criminal Division

In an unprecedented collaboration of incountry and headquarters training, on June 1-5, 1998, in the Washington, D.C., area,[1] the first of two interagency anti-money laundering/asset forfeiture courses of instruction[2] was offered to Colombian prosecutors and investigators who completed a one-week course of instruction in Bogota, Colombia, by OPDAT and ICITAP.[3]

This first group was comprised of: 16 prosecutors from the Fiscalia; 13 investigators from the Technical Investigative Corps[4] assigned to the Money Laundering Unit[5]; seven investigators from the DAS; seven from the National Police; two from INCOMEX (Import/Export Control); two from the DIAN (Colombian Customs); and one representative from the Banking Superintendency. Each of these individuals is assigned to, or will serve in a liaison capacity with the newly-created Asset Forfeiture/Money Laundering Special Unit in the Office of the Fiscal General in Colombia.

During the week of June 15-19, 1998, identical training was offered to another group from the Money Laundering Unit. In addition to the basic regimen of anti-money laundering/asset forfeiture training, this course of instruction focused on the Colombian Black Market Peso Exchange (BMPE) process[6] and the importance of Colombia aggressively enforcing its recently-passed Anti-Smuggling Law.[7] Deputy Assistant Attorney General Mary Lee Warren and Colombian Fiscal General Alfonso Gomez Mendez made closing remarks on June 5.

This incountry and U.S. training represent milestones in three significant areas:

- It marks the creation of the largest task force within Colombia that will be responsible for handling independently, or assisting the United States to handle some of the most significant drug proceeds money laundering and asset forfeiture cases;
- It demonstrates the acceptance of the Special Unit methodology developed by OPDAT and ICITAP and promoted by the Department of Justice. Among other things, this methodology involves the coordination of investigative planning, the task force approach involving all three investigative judicial police agencies, and the use of an oral approach—*i.e.*, direct communication between investigative team members rather than the use of a purely written communication, as well as oral rather than written interviews; and
- It demonstrates the important role an entity such as OPDAT can play in facilitating U.S. justice policy. In this case, it is forming individuals into a strike force to receive specialized training in the United States.

As is always the case, the ultimate proof of this training will be in investigations undertaken, prosecutions successfully undertaken, and illicit proceeds identified, seized, and forfeited. But we believe that our combined efforts give us the best hope of ultimate success in a crucial area to law enforcement in both countries and the region.

Endnotes

[1] The training was held at a U.S. Postal Service dormitory facility located in Montgomery County, Maryland.

[2] Agencies participating in the training were the Drug Enforcement Administration, the Federal Bureau of Investigation (FBI), the Internal Revenue Service, the U.S. Customs Service, the U.S. Postal Inspection Service, Financial Crimes Enforcement Network, and headquarters staff from both the Department of Justice and the Department of the Treasury.

[3] This incountry training was coordinated by the Department of Justice (OPDAT and ICITAP), the Colombian Prosecutor General's Office and the three Colombian police agencies (CTI, DAS, and the National Police), and involved instruction in the concept of a task force—*i.e.*, the importance of investigators and prosecutors working together as a team. At the conclusion of this training, over 150 participants were formed into a task force, consisting of: 30 prosecutors; 60 police investigators; 5-10 representatives from Colombian financial and financial intelligence agencies; and the remaining paralegals and support staff.

[4] This group is equivalent to our FBI.

[5] The Money Laundering Unit was established in the Office of the Attorney General, by Decree 0-0681 dated March

20, 1998. The Colombian Prosecutor General's Office has given its verbal commitment not to remove any of the assigned prosecutors or investigators from this unit for the next three years, other than for cause.

[6] Both U.S. and Colombian law enforcement believe that billions of dollars worth of drug proceeds generated in the United States are laundered through the Colombian BMPE in Bogota and elsewhere in Colombia, and these narcodollars supply the funds for the movement of billions of dollars worth of smuggled goods such as cigarettes, alcohol products, and electronic goods into Colombia. Thus, attacking smuggling of consumer and other goods into Colombia indirectly attacks the system by which narcotraffickers are being paid for their product. *See Money Laundering Monitor*, January-June 1998, at 12, 15.

[7] Law 383, enacted on July 10, 1997.

U.N.'s GPML Releases Anti-money Laundering Report

By Andrew Aulisi, United Nations Global Programme against Money Laundering, Vienna, Austria

The Global Anti-drugs Conference was held in New York in June 1998, inaugurated by the United Nations (U.N.) Secretary-General Kofi Annan, who called on all of the U.N.'s 185 member states to continue their commitment to fighting a world drug problem together. Money laundering was a prominent issue on the agenda and was marked by a high-profile panel discussion on the third day of the conference.

During a press briefing, Jean Francois Thony, manager, Global Program against Money Laundering (GPML) of the U.N. Office for Drug Control and Crime Prevention, announced the release of a preliminary report, entitled "Financial Havens, Banking Secrecy and Money Laundering," which was authored by four leading independent experts in the field. The aim of the study was to inform U.N. members states, and to stimulate discussion, about issues associated with bank secrecy and financial havens, particularly as they impede international financial investigations.

It is estimated that only 30 percent of the countries worldwide have effective anti-money laundering laws in place to deter the staggering amounts of money laundered annually, much of which passes through financial havens. In the era of globalization, some states have built their financial sectors by offering competitive and attractive financial services, yet these services may be exploited by launderers to hide the real ownership and origin of the proceeds of crime. The report identifies about eight major financial havens, including those in the Caribbean, Europe, the Asia-Pacific region, and the Middle East.

The study stresses the absence of regulation of offshore business and particularly the legal practice for the creation of shell companies. There are many jurisdictions that sell "offshore" corporations which are licensed to conduct business only outside the country of incorporation, are free of tax or regulation, and are protected by corporate secrecy laws. In conducting financial investigations, law enforcement authorities may encounter one level of bank secrecy, one level of corporate secrecy, and possibly the additional protection of lawyer-client privilege if counsel in the corporate secrecy haven has been designated to establish and run the company. In addition, many laundering schemes involve another layer of cover, that of the offshore trust, which is usually protected by secrecy laws and may have an additional level of insulation in the form of a clause that permits the trustee to shift the domicile of the trust whenever the trust is threatened.

Other trends that impede the identification, freezing, and forfeiture of criminally-derived income and assets are discussed, including: the dollarization of black marketers; the general trend towards financial deregulation; the progress of the Euromarket; and the proliferation of financial havens. Also, the study addresses the manner in which money laundering schemes often approximate legal transactions.

The final section of the report looks at issues for consideration in relation to preventive and control measures that might be taken to enhance compliance with the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and to make it more difficult for money launderers and other criminals to exploit banking jurisdictions. Copies of the report may be obtained from the Office for Drug Control and Crime Prevention, GPML, P.O. Box 500, A-1400, Vienna, Austria.

Notable Cases

By Lester M. Joesph, Assistant Chief, AFMLS, Criminal Division

Money Laundering/ Inconsistent Verdicts/ Proceeds

- *Dismissal of underlying mail fraud counts did not mandate dismissal of money laundering counts.*

- *A mail fraud scheme can create proceeds which can be laundered long before the mailing ever takes place.*

Defendants stole money from a corporation they controlled by having other companies send them inflated invoices and receiving kickbacks in the form of checks made out to either fictitious payees or two companies owned by the defendants. The cashing or depositing of the "kickback" checks was charged as money laundering predicated on mail fraud in violation of 18 U.S.C. § 1956(a)(1)(B)(i). All substantive mail fraud counts were dismissed prior to trial on the grounds that the Government did not prove that the mailings furthered the fraud. Defendants were convicted of the money laundering offenses.

On appeal, Defendants argued that, because the court dismissed the mail fraud counts, the Government lacked evidence of predicate offenses necessary for money laundering. The panel rejected this argument on the ground that money laundering does not require proof that the proceeds involved in the transaction were traceable to a specific predicate offense. Rather, a money laundering conviction may be sustained even where a defendant is acquitted on counts charging the predicate offense in question. A money laundering conviction merely requires proof that the laundered funds constituted the proceeds of a predicate—in this case, mail fraud. Thus, the panel found, pretrial dismissal of the mail fraud counts did not impair the money laundering convictions that were predicated on mail fraud.

Significantly, for prosecutors, the panel noted that the money laundering counts made only a very general reference to "specified unlawful activity, that is mail fraud." It suggested that its conclusion might be different if the money laundering counts had identified as "specified unlawful activity" only the specific incidents of mail fraud alleged in the dismissed substantive counts.

The panel further held that there need only be sufficient circumstantial evidence for a jury reasonably to infer beyond a reasonable doubt that the proceeds involved in a money laundering offense arose from the kind of conduct that constitutes "specified unlawful activity" without having to trace the proceeds back to specific offenses. In this case, the court held that the evidence presented by the Government constituted sufficient evidence from which the jury could infer that the laundered funds came from a fraudulent scheme and that the use of the mails furthered that scheme.

Defendants, relying on case law indicating that the predicate crime must be "complete" before there can be a money laundering transaction, also argued that the Government failed to prove that the use of the mails in this case (the mailings of phony duplicate invoices) occurred *before* the transactions involving the fraudulently obtained funds. The panel rejected this argument. It explained that the cases in question, although indicating that the predicate crime must have been "complete" before the money laundering occurs, really were concerned with *when* the defendants received the proceeds of specified unlawful activity: "[T]he predicate offenses must produce proceeds before anyone can launder those proceeds." Turning to the predicate crime of mail fraud in the case before it, the panel cited the Supreme Court decisions in *United States v. Sampson*, 371 U.S. 75 (1962), and *Schmuck v. United States*, 489 U.S. 705 (1989), as standing for the proposition that a mail fraud scheme can produce proceeds long before the mailing that triggers federal jurisdiction occurs. The court contrasted mail fraud with bank fraud and wire fraud:

> Bank fraud creates proceeds only after execution. Wire fraud creates proceeds only after a wire transfer. A mail fraud scheme, however, can create proceeds long before the mailing ever takes place.

The court further held that a mailing may further the mail fraud scheme even if it occurs long after the scheme generated proceeds. It found that the possibility that Defendants' fraud scheme may have generated proceeds, and that Defendants may have engaged in separate acts to launder those proceeds, before the jurisdictional mailing occurred to be immaterial. It explained that, because money laundering does not focus on the specifics of the predicate offense, it does not matter when all the acts constituting the predicate offense take place. It held that the money laundering statutes require only that the predicate criminal activity have produced proceeds in transactions distinct from those transactions allegedly constituting money laundering. The panel concluded that the mailings of the "file copy" invoices in this case furthered the scheme to defraud by maintaining the appearance that the fraudulent kickback payments were part of normal business operating procedures.

Finally, the panel sustained the district court's jury instruction which told the jury only that it must find that the allegedly laundered funds derived from a "mail fraud scheme." However, it referred to this instruction as "fuzzy" and opined that it would be better to inform the jury that it must find, perhaps based on inference from circumstantial evidence, that the funds involved in the charged money laundering offenses were the proceeds of "a fraudulent scheme that was furthered by the knowing use of the mails."

United States v. Mankarious, 151 F.3d 694 (7th Cir. 1998). Contact: AUSA Joseph R. Wall, AWIE01(jwall).

Comment: The court in *Mankarious* stated that the case may have come out differently if the money laundering counts in the indictment specified particular predicate offenses (*i.e.*, specific counts of the indictment). In money laundering counts, prosecutors often refer to specific counts of the indictment when alleging the nature of the specified unlawful activity. Consequently, in order to protect money laundering counts from reversal if the underlying predicate counts should be reversed, prosecutors may be advised to refer to the specified unlawful activity in the money laundering counts by reference to the predicate offense (*e.g.*, mail fraud in violation of 18 U.S.C. § 1341), but not to refer to the counts of the indictment which allege violations of the specified unlawful activity.

Money Laundering/ Conspiracy/Sentencing Guidelines

- *Trial court improperly failed to apply money laundering sentencing guidelines to a multi-object section 371 fraud conspiracy where money laundering was one of the objects.*

- *Panel's finding of a Rule 11 violation reversed by* en banc *decision because Defendant failed to cross-appeal from trial court's decision.*

In an *en banc* review of a panel decision found at *United States v. Coscarelli*, 105 F.3d 984 (5th Cir. 1997) (*see* discussion in the *Money Laundering Monitor*, July-December 1997, at 15-16), the Fifth Circuit reversed the panel's ruling that the trial court violated Rule 11 when it failed to inform Defendant of the maximum sentence for each offense in a multi-object conspiracy. The basis for the *en banc* ruling was that Defendant never appealed from the trial court's decision; only the Government appealed.

Defendant Coscarelli entered a "straight-up" plea of guilty to a multi-object conspiracy offense (mail fraud, wire fraud, and money laundering) charged under 18 U.S.C. § 371 and to ten mail fraud and wire fraud counts arising out of a telemarketing scheme. He was not separately charged with either money laundering conspiracy under section 1956(h) or substantive money laundering offenses.

The statutes under which Coscarelli was convicted (section 371 and the mail and wire fraud statutes) each impose a maximum term of imprisonment of only five years. Yet, the Sentencing Guidelines state that the base offense level and relevant conduct adjustments for conspiracy offenses are those in the "guideline for the substantive offense" that was the object of the conspiracy. *U.S.S.G.* § 2X1.1. While the mail and wire fraud statutes, as well as section 371, authorize a statutory maximum of five years (unless the offense affects a financial institution), the money laundering statute authorizes a maximum sentence of 20 years.

The district court, at the Rule 11 (guilty plea) hearing, informed Coscarelli that the maximum term of imprisonment on each count was five years. Moreover, the Government—at least according to the appellate panel—offered no factual basis to substantiate the money laundering "object" of the conspiracy. Yet the pre-sentence report focused on this object in calculating Defendant's guideline sentence. Consequently, application of the Money Laundering Sentencing Guidelines to Coscarelli yielded a punishment range of 121-151 months. Coscarelli objected to this calculation, claiming that he never intended to commit money launder-

*See **Cases**, page 24*

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ing. The district court agreed, disregarded the money laundering object, and calculated a guidelines range of 51-63 months using the fraud guidelines.

The Government appealed, charging error in the sentencing. Coscarelli did not cross-appeal. The panel agreed with the Government, held that the Money Laundering Sentencing Guidelines should have been employed, and remanded the case for resentencing. However, the panel also granted Coscarelli, who had not cross-appealed, affirmative relief by vacating his guilty plea; thus, freeing him to negotiate, if possible, a better deal on remand (there was no plea agreement in the first go-around: it was a straight-up plea).

The *en banc* court ruled that the panel erred in granting Coscarelli, a non-appellant, affirmative relief by releasing him from his guilty plea, thereby sending the case back to the district court, where Coscarelli will remain bound to his plea, and he will be resentenced for the section 371 conspiracy using the money laundering guidelines. Judges DeMoss and Garza dissented from the decision, suggesting that holding Coscarelli to his plea in these circumstances might be an "error of constitutional magnitude," which should excuse the cross-appeal requirement.

United States v. Coscarelli, 149 F.3d 342 (5th Cir. 1998) (*en banc*).

Comment: As was stated in the comment section of the *Money Laundering Monitor*, July-December 1997 at 16, the issue raised can be avoided if prosecutors charge the money laundering conspiracy provision—section 1956(h)—and/or a substantive money laundering count whenever the Government is seeking imposition of a sentence based on the money laundering guidelines. Otherwise, prosecutors should affirmatively inform the defendant and the court prior to entry of the guilty plea that the Government intends to seek application of the money laundering guidelines when the defendant pleads to a section 371 conspiracy which lists money laundering as one of its objects, and the prosecutors should provide a full factual basis for the money laundering object during the plea colloquy.

Money Laundering/ Conspiracy/Multiple Intents/Value of the Funds

- *Where the district court charged that the jury must find a conspiracy to commit both types of money laundering (promotion and concealment) and the jury did so, the appellate court need only examine whether the evidence was sufficient to convict one type or the other.*

- *In determining sentences in a money laundering conspiracy, a sentencing court must separately determine the value of the laundered proceeds attributable to each conspirator.*

Defendants were convicted of mail fraud and conspiracy to launder money, based on a scheme whereby they falsely advised people that a class action suit had been won and that the persons were entitled to the money if they sent the conspirators $300 to cover the administrative costs of processing the claim. The court affirmed. Four defendants argued that there was insufficient evidence to prove that they conspired to launder money (18 U.S.C. §1956(h), with objects of the conspiracy being 18 U.S.C. § 1956(a)(1)(A)(i) (promotion) and (B)(i) (concealment)).

At trial, the district court instructed the jury that it must find both the promotion and concealment prongs of the conspiracy, and the jury found both. Thus, the appellate court found it necessary only to examine whether the evidence was sufficient to convict of one type of money laundering or the other. Because "promotion" money laundering carries a higher base offense level than "concealment," the court examined whether the evidence was sufficient to establish "promotion" money laundering. In this case, the court found that the promotion was proven by evidence that the defendants used proceeds of the fraud scheme to pay for office supplies, secretarial services, office staff wages and other expenses of the scheme. Thus, the convictions were affirmed.

With respect to sentencing, the probation officer recommended, and the district court agreed, that the "value of the funds" determination should be based upon the jury's money laundering forfeiture verdicts against each defendant. The Government appealed these determinations, arguing that they significantly understated the value of money laundered by all of the defendants except one. The Government contended that the amount of money laundered should be equal to the amount of the fraud loss and that each defendant's money laundering sentence should be based on the total amount of claim fees that the Government proved. The appellate court rejected the Government's argument, distinguishing between fraud sentences, which are based on the amount of loss to victims, and money laundering sentences, which are based on the value of the money laundered. Consequently, the sentencing court must separately determine the value of laundered proceeds attributable to each conspirator, based on the amount which was reasonably foreseeable relevant conduct for each money laundering conspirator.

The appellate court then noted that the different kinds of money laundering (concealment or promotion) charged in the case will affect the value of the funds determination. For example, when a fraud scheme involves a money laundering concealment device, it is likely that all proceeds have been concealed and will therefore count in the value determination. It is less likely, however, that all illegal proceeds will have been reinvested in an illegal enterprise (promotion) because some may have been withdrawn, for example, for the conspirators' personal living expenses. Thus, "when the [G]overnment starts with the higher base offense level for reinvestment money laundering, it may encounter greater problems in proving the value of the illegal proceeds that were laundered." In this case, the appellate court approved of the value determination and affirmed the sentences for money laundering.

United States v. Hildebrand, 152 F.3d 756 (8th Cir. 1998). Contact: AUSA Marty McLaughlin, AIAN01(mmclaugh).

Section 1956(a)(2)(A)/ Conspiracy/Unanimity

- *District court's failure to give a specific unanimity instruction in a conspiracy to violate section 1956(a)(2)(A) was not plain error, where the judge gave a general unanimity instruction and the conspiracy encompasses moving money both into and from the United States.*

Defendants Narviz-Guerra (Narviz) and Grant used a ranch on the Texas-Mexico border to smuggle marijuana from Mexico into Texas. They also arranged to transfer funds from Mexico to the United States to purchase the ranch in violation of section 1956(a)(2)(A). They were tried and convicted of drug trafficking offenses and conspiracy, under section 1956(h), to violate section 1956(a)(2)(A).

On appeal, Narviz challenged his section 1956(h) conspiracy conviction on the ground that the judge failed to give a specific instruction requiring unanimity. The judge instructed the jury that the Government had to prove that two or more people agreed to launder money either by sending funds from or to the United States. Narviz, who did not raise this issue at trial, argued that this was error because it is unclear whether he was convicted of sending money to or from the United States. The Fifth Circuit noted that the case relied upon by Defendant, *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), did not apply because Narviz was convicted of conspiracy and not the substantive offense. Rather, in the conspiracy context, when twelve jurors agree that a defendant agreed to commit a crime, all jurors do not have to agree about which offense Defendant personally intended to commit. In this case, the judge gave a general unanimity charge and the conspiracy to launder money encompasses moving money both to and from the United States. Consequently, applying the plain error standard, the Fifth Circuit ruled that the district court's failure to give a specific unanimity instruction was not plain error.

Defendant Grant attacked his conviction for conspiracy to violate section 1956(a)(2)(A) for transferring money to or from the United States with the intent to promote marijuana distribution. He argued that, although he transferred money from Mexico to the United States to pay for the ranch, there was insufficient evidence showing that he knew that the ranch was being used for illegal activity. While the appellate court conceded that this evidence was thin, there was sufficient evidence to support the jury's verdict that Grant laundered money.

United States v. Narviz-Guerra, 148 F.3d 530 (5th Cir. 1998). Contact: AUSA Mark Marshall, ATXWA01(mmarshal).

Comment: While Narviz' conspiracy was upheld under a plain error standard, prosecutors should exercise care in drafting jury charges in money laundering prosecutions. The money launder-

*See **Cases**, page 26*

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ing statutes provide numerous alternative charging choices, and these alternatives must be presented clearly to the jury for consideration. Where there are alternative bases for conviction, such as multiple specific intents within a single count, the use of special verdicts should be considered and specific unanimity charges should be given.

Money Laundering/ Knowledge/Willful Blindness

- *Willful blindness instruction properly given when a defendant claims a lack of knowledge of source of funds and facts support an inference of defendant's conscious course of deliberate ignorance.*

Defendants Patricia and Patrick Cunan (husband and wife) were convicted of conspiracy and money laundering for their role in laundering the drug proceeds generated by Richard DeCato, Patricia's former brother-in-law. Patrick was sentenced to 121 months imprisonment; Patricia received a sentence of 60 months imprisonment. The Cunans were never involved in the sale or distribution of drugs and contended that they were unaware that DeCato's money came from illegal activities.

Patrick was the owner and president of State Scale Company, which sold, rented, and serviced industrial scales. Patricia was the office manager of the business. DeCato was arrested for drug trafficking in 1981 and subsequently became a fugitive. During the time DeCato was a fugitive, he laundered money through State Scale, primarily through the purchase of real estate, goods, and bars of silver. Typically, DeCato would give cash or bank checks to the Cunans for them to deposit in their checking accounts. The amounts deposited were less than $10,000, thus, avoiding currency reporting requirements. The Cunans would contemporaneously write checks to DeCato's creditors. Patrick took title to real estate purchased with DeCato's funds, and DeCato registered his automobiles as State Scale vehicles. Some of the transactions were accomplished through two sham corporations set up by the Cunans.

On appeal, Patrick alleged that it was error for the court to instruct on willful blindness because there was insufficient evidence to support the instruction. The appellate court rejected this claim, finding that a trial court may instruct the jury concerning willful blindness "when a defendant claims a lack of knowledge, the facts support an inference of defendant's conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood by a juror as mandating the inference of knowledge." The court also rejected Patrick's argument that, when there is an absence of evidence showing deliberate acts on a defendant's part, aimed at avoidance of actual knowledge, then the willful blindness instruction should not be given. Rather, all that is required is that "the facts support an inference of [D]efendant's conscious course of deliberate ignorance."

Patrick next argued that the willful blindness instruction should have included a statement that mere recklessness is not enough to support a finding of willful blindness. The appellate court ruled that the instruction at issue was adequately worded to avoid such a danger. The instruction, which spoke of conscious acts of avoidance—such as "deliberately fails to make further inquiries," "shut his or her eyes"—conveyed the proper standard to apply in assessing the Cunans' conduct and did not suggest that anything less would suffice.

Finally, Patrick contended that the district court failed to instruct the jury that it must find willful blindness beyond a reasonable doubt. The First Circuit noted that this argument indicated that Patrick failed to recognize the purpose of the willful blindness instruction. "Willful blindness" is not a substitute for the knowledge element; rather, it is one way in which his knowledge element of the offense can be established. In this case, the record demonstrated that the court instructed the jury that the Government must prove the knowledge element of the offense beyond a reasonable doubt, before outlining the ways in which the knowledge element could be satisfied, including willful blindness. Therefore, the jury was properly instructed and the convictions were affirmed.

United States v. Cunan, 152 F.3d 29 (1st Cir. 1998). Contact: AUSA Shelby D. Wright, AMA12(swright).

Money Laundering/ Knowledge/Willful Blindness

- *Willful blindness/deliberate ignorance instruction properly given where evidence was presented from which the jury could infer that Defendant consciously avoided actual knowledge that the $13,000 cash he received from client was criminally-derived.*

Defendant Bornfield was a certified public accountant in Albuquerque, New Mexico. In the late 1980s, he prepared tax returns for Sidney and Laurenda Terrell and Richard Gonzagowski. During this time, Sidney Terrell (Terrell) owned a variety of fledgling businesses and Gonzagowski was self-employed in the roofing business. However, Terrell and Gonzagowski both testified that they earned most of their income in the late 1980s and early 1990s from drug trafficking.

In 1993, Terrell and Gonzagowski had to make a $25,000 loan payment on a piece of property they had purchased. Laurenda tried to make the payment with a $12,000 check from Bornfield (comprised of $5000 from Terrell and $7000 loaned by Bornfield to Terrell) and $13,000 in cash from Gonzagowski. When the mortgage company refused to take the cash for security reasons, Laurenda called on Bornfield for assistance. Bornfield took the cash and wrote a check from his personal account to the mortgage company in the amount of $13,007.42. Thereafter, the $13,000 in cash was deposited into Bornfield's personal account in three installments over six days. Subsequently, Bornfield and his three compatriots were indicted.

After his codefendants entered into plea agreements, Bornfield faced a two-count indictment charging one violation of section 1957 (based on his receipt of the $13,000 cash) and one violation of 31 U.S.C. § 5324(a)(3) (based on the structuring of the $13,000 cash into the bank). Bornfield was convicted of the section 1957 count.

On appeal, Bornfield contended that the district court erred by instructing the jury on deliberate ignorance with respect to the money laundering charge, arguing that the Government failed to present evidence that he performed deliberate acts to avoid actual knowledge that the $13,000 cash from Gonzagowski was criminally-derived property. Since Bornfield failed to object to the instruction at trial, the appellate court reviewed the issue for plain error. The instruction at issue read as follows:

> As it relates to Count One, you may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

The Tenth Circuit ruled that the deliberate ignorance instruction was properly given, finding that a deliberate ignorance instruction is appropriate if the defendant denies knowledge of an operative fact and the evidence demonstrates or creates the inference that the defendant deliberately avoided actual knowledge of that fact. From the evidence presented in this case, the appellate court held that a jury could reasonably infer that Bornfield consciously avoided actual knowledge that the $13,000 cash given to him in exchange for his check was from Gonzagowski and that he deliberately avoided knowing Gonzagowski had another source of income beyond his legitimate roofing business; *i.e.*, funds from the illegal sale of drugs. Consequently, the instruction was properly given; and the instruction properly instructed the jury that, in order to find knowledge based on deliberate ignorance, it must find that the defendant purposely avoided learning the operative fact and it could not base its finding on what Defendant should have known.

United States v. Bornfield, 145 F.3d 1123 (10th Cir. 1998). Contact: Assistant Chief Stefan D. Cassella, AFMLS, Criminal Division, CRM20(scassell).

Section 1957/Knowledge/ Criminally-derived Property

- *To obtain a conviction under section 1957, the Government is not required to prove that the defendant knew that the offense from which the criminally-derived property was derived was specified unlawful activity.*

Defendant Hawkey, a sheriff in Minnehaha County, South Dakota, was charged in a 41-count indictment for misusing funds belonging to the Sheriff's Department. The indictment included 24 counts of mail fraud and eight violations of section 1957.

On appeal, Hawkey challenged the sufficiency of the evidence of his section 1957 convictions. In affirming the convictions, the appellate court noted that, in order to obtain a conviction under section

*See **Cases**, page 28*

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1957 and to establish the knowledge element, the Government is not required to prove that Hawkey knew that the offense from which the criminally-derived property was derived was specified unlawful activity; it is only necessary to prove that Defendant knew that the funds involved in the monetary transaction were criminally-derived. In this case, the appellate court concluded that the evidence was sufficient for a reasonable jury to find that Hawkey knowingly engaged in a monetary transaction in criminally-derived property that was in excess of $10,000 and was derived from specified unlawful activity.

With respect to the sentencing guidelines for the convictions under section 1957, Defendant challenged the two-level enhancement under *U.S.S.G.* § 2S1.2(b)(1)(B), arguing that this enhancement constituted double counting.. Again, the court noted that knowledge that the property at issue was derived from a specified unlawful activity is not a required element under section 1957. Under *U.S.S.G.* § 2S1.2(b)(1)(B), a two-level enhancement is warranted when the defendant *knew* that the funds were not merely criminally-derived, but were, in fact, the proceeds of a specified unlawful activity. Since the specific offense characteristic enhancement applies to conduct that is not an element of the offense, it does not amount to impermissible double counting.

United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998). Contact: AUSA Gregg S. Peterman, ASDR01(gpeterma).

Money Laundering/ Sentencing Guidelines/ Grouping

- *District court improperly grouped fraud and money laundering counts together for purposes of computing sentencing guideline.*

A difficult issue involving the sentencing guidelines for money laundering (*U.S.S.G.* § 2S1.1, 2S1.2) is whether money laundering counts should be grouped with counts involving the specified unlawful activity. On this issue, there is a split among the circuits and, in some cases, even within circuits. The grouping issue is important, of course, because where money laundering and specified unlawful activity counts are not grouped together but form separate groups, the group with the highest offense level may be increased by up to five offense levels. *See U.S.S.G.* § 3D1.4. Also, different rules may apply depending on whether the specified unlawful activity involves fraud or other offenses. Moreover, there may be different considerations in grouping counts pursuant to section 3D1.2(a)-(c) and (d), which affects grouping for purposes of calculating the value of the funds.

With respect to fraud offenses, the Third, Fifth, Seventh, and Eleventh Circuits appear to have taken the position that money laundering and fraud offenses should be grouped. The rationale for these decisions is that both the fraud and the money laundering offenses harm the same victim. In many cases, the money laundering conduct at issue involves promotion under section 1956(a)(1)(A)(i). *See, e.g., United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992) (Third Circuit affirmed the district court's decision to group money laundering with other offenses, where the evidence demonstrated that the specified unlawful activity offenses and money laundering were all part of one scheme to obtain money from an employee benefit fund); *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995) (appellate court found that money laundering and fraud constituted part of the same continuing criminal endeavor to obtain money from elderly victims and to use that money to facilitate the continuance of the scam); *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996) (appellate court reversed and remanded the sentence of a Ponzi scheme operator on the ground that his convictions for money laundering and mail fraud should have been grouped); *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996) (the Eleventh Circuit held, in a Ponzi scheme case, that money laundering and fraud convictions should be grouped together because they are closely related).

The First, Eighth, Ninth, and Tenth Circuits have held that fraud and money laundering offenses should not be grouped. These courts have determined that the fraud and money laundering offenses do not involve the same victims because the victim of a fraud is the person defrauded, while the victim of money laundering is society. The Eighth Circuit eloquently stated this distinction in reversing the district court's decision to group the specified unlawful activity and money laundering counts in *United States v. O'Kane*. O'Kane was an assistant manager of a grocery store who defrauded his employer of over $300,000 worth of baseball cards. He pled guilty to one count of mail fraud and one violation of section 1957 resulting from his purchase of a pickup truck. At sentencing, the trial court grouped the fraud and money laundering count together to arrive at a single count group with a base offense level of 19. The Government appealed from this determination.

On appeal, the Eighth Circuit reviewed the split in the circuits on the grouping issue. In making its determination under section 3D1.2(b) of the guidelines, the court focused on the issue of whether the same person or entity was the victim of both crimes. In this case, the court found that the victims were not the same in the money laundering and fraud offenses:

> Fraud clearly harms the defrauded. But money laundering harms society's interest in discovering and deterring criminal conduct, because by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy. The interest of the law-abiding general public in preventing the criminals among us from profiting from their crimes is invaded when criminally derived funds are laundered to allow the criminal unfettered, unashamed and camouflaged access to the fruits of those ill-gotten gains.

Consequently, finding that the victims of the two offenses were different, the court ruled that the trial court improperly grouped the offenses and remanded the case for resentencing. In doing this, however, the court also noted that the value of the funds involved in the money laundering offense is limited to the amount of money O'Kane was charged with laundering ($73,562); it should not include the total amount he was charged with obtaining as a result of the fraud ($304,667).

United States v. O'Kane, 155 F.3d 969 (8th Cir. 1998). Contact: AUSA Marty McLaughlin, AIAN01(mmclaugh).

Money Laundering/ Conspiracy/Entrapment

- *En banc decision of Fifth Circuit reverses panel decision, which required the Government to prove "positional predisposition" in order to rebut an entrapment defense.*

In another *en banc* reversal of a panel decision (previously reported in the *Money Laundering Monitor*, July-December 1997, at 14-15), the Fifth Circuit reinstated the conviction of Defendant David Brace, which had been reversed by the panel in the case of *United States v. Knox*, 112 F.3d 802 (5th Cir. 1997). In so doing, the Fifth Circuit concluded that the panel's decision, which required the Government to prove "positional predisposition" in order to rebut an entrapment defense, could not stand because the issue "was neither preserved in district court nor even raised, for the first time, on appeal."

Defendant Brace was a minister of the Faith Metro Church of Wichita, Kansas. The church was in debt and needed to raise $10 million to pay off creditors. Defendant Knox, Brace's financial adviser, was introduced to DEA undercover agents (UCAs) who told him they were looking for ways to launder drug money. Knox told the UCAs that he knew someone interested in laundering the drug money through a church and later introduced the UCAs to Brace.

After discussions, the UCAs agreed to loan Brace $10 million of drug proceeds, but before turning over the $10 million in cash, they set up three practice transactions. On three occasions, the UCAs gave Brace $100,000, $100,000 and $150,000 in cash, and Brace arranged for the money to be wired to an account at an English bank. At the final meeting when the UCAs were supposed to turn over the $10 million in drug money to Brace, Brace and Knox were arrested. They were convicted of money laundering under the sting provisions of section 1956(a)(2)(B)(i) and 1956(a)(3)(B).

On appeal, Brace argued that he was entrapped. The Government conceded that Brace was induced; therefore, the evidence must prove that Brace was predisposed to launder money. The Fifth Circuit panel reversed Brace's conviction based on the reasoning of the Seventh Circuit in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (*en banc*). The court held that in determining predisposition:

> [W]e must look not only to the defendant's mental state [his "disposition"], but also to whether the defendant was able and likely, based on experience, training, and contacts, to actually commit the crime [his "position"].

Notwithstanding the fact that Brace was introduced to the UCAs by a coconspirator as a person willing to launder drug money, the panel found that "the [G]overnment failed to prove that Brace, absent government involvement, was in a position to launder money." There-

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fore, the panel ruled that the evidence was insufficient to prove that Brace was predisposed to launder money and his conviction was reversed.

The Fifth Circuit subsequently granted rehearing *en banc* to consider the issue of "positional predisposition." However, as noted above, the court concluded that it could not address this subissue because it was not preserved in the district court and was not even raised by the defendant on appeal. Consequently, the Fifth Circuit stated that the issue for the *en banc* court was simply whether, under existing Fifth Circuit precedent, Brace was entrapped as a matter of law. After an extensive review, the court determined that, under existing relevant precedent, the evidence produced at trial was more than sufficient for a rational juror to conclude that Brace was predisposed to launder money. While noting that the issue of "positional predisposition" remains for another day and another case, the Fifth Circuit affirmed Brace's convictions for money laundering. Three judges dissented, believing that Brace was entrapped as a matter of law.

United States v. Brace, 145 F.3d 247 (5th Cir. 1998). Contact: AUSA Richard Durbin, ATXW01(rdurbin).

Comment: The Fifth Circuit's *en banc* decision provides welcome relief from the panel's decision. While the Seventh Circuit's decision in Hollingsworth, *supra*, is disappointing, the acceptance of the doctrine of "positional predisposition" by another circuit was an ominous sign, especially in a case such as this, where Defendant Brace was not sought out by government agents. In this case, Brace was introduced to the undercover agents by coconspirators as a person who was ready, willing, and able to launder drug money. While there was no evidence that Brace had ever been involved in money laundering prior to meeting the UCAs, clearly he was predisposed to engage in money laundering when he met them because he offered to launder their drug money and subsequently did so. The panel's decision would have conferred virtual immunity on persons who have not previously engaged in illegal activity but nonetheless indicated a predisposition and a willingness to do so. At least for now, the doctrine of "positional predisposition" will be confined to the Seventh Circuit.

Just A Reminder . . .

Please send AFMLS:

A copy of any money laundering indictment charging a violation of 18 U.S.C. § 1956 or 1957. Include with the indictment:

- case number and date of return; and
- date the indictment was unsealed.

AFMLS/CRM/DOJ
1400 New York Avenue, N.W.
Bond Building, Tenth Floor
Washington, D.C. 20005

Required by: ***United States Attorneys' Manual* § 9-105**

Money Laundering/ Sentencing Guidelines/ Departure

- *Fifth Circuit upholds district court's downward departure in money laundering case involving election fraud.*
- *Eighth Circuit upholds district court's downward departure in a case involving bankruptcy fraud and money laundering.*
- *District court in the Southern District of New York grants downward departure in case of interior decorators who launder drug money for Jose Santacruz Londono.*

Perhaps the most contentious legal issue in money laundering cases is the issue of departures in sentencing. Because of the disparity between the Sentencing Guidelines for money laundering and those for the underlying predicate activity in certain white-collar crime cases, judges who have felt that the offense level based on the sentencing guidelines is too high for money laundering offenses have departed downwards pursuant to *U.S.S.G.* § 5K2.0. Under this section, courts may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Departures based on this provision are often referred to as "heartland" departures. The term "heartland" is derived from the guidelines, which state that:

> The [c]ommission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

U.S.S.G., ch. 1, pt. A, intro. comment 4(b). In this way, the heartland departure enables courts to avoid rigid application of the guidelines, provided they articulate reasons why they deem the case atypical. However, the difficulty lies in identifying which factors a court may consider in evaluating atypicality. In *United States v. Koon*, 518 U.S. 81 (1996), the Supreme Court directed sentencing courts to ask four questions, the first of which is, "What features of this case, potentially, take it outside the [g]uidelines' 'heartland' and make of it a special, or unusual case?" 518 U.S. at 95.

The issue of what constitutes the heartland of a money laundering offense has been vigorously debated in cases where trial courts have departed downward. These departures have met with varied results in the appellate courts. In three recent money laundering cases, two appellate courts have upheld downward departures and a trial court has granted a downward departure, on the basis that a crime was outside of the heartland of money laundering.

In the first case, *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998), the Fifth Circuit affirmed the trial court's downward departures for Defendants Hemmingson and Ferrouillet, who were involved in a scheme to funnel an illegal $20,000 corporate campaign contribution to help Henry Espy pay off a campaign debt resulting from his unsuccessful campaign for Congress. The specified unlawful activity in this case was interstate transportation of stolen property (18 U.S.C. § 2314). The trial court departed downward from the money laundering sentencing guidelines because it found the case atypical and therefore outside of the heartland. The trial court determined that the money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime. The court distinguished Defendants' conduct from that which ordinarily warrants sentencing under section 2S1.1—namely, large-scale laundering of the fruits of organized crime.

The Government argued in *Hemmingson* that these factors are already taken into account by the guideline, and therefore cannot serve as a basis for departure, pointing out that the guideline provides for a three-level increase if the defendant knew or believed the funds were the proceeds of drug trafficking. The Fifth Circuit rejected the Government's arguments and affirmed the trial court's departure, finding that the trial court articulated "relevant facts and valid reasons why the circumstances of this case were . . . sufficient to take it outside of the heartland of relevant cases."

The second case, *United States v. Woods*, 159 F.3d 1132 (8th Cir. 1998), upheld the trial court's downward departure in a money laundering case predicated on bankruptcy fraud. Defendant in this case, Nanci Woods, filed for bankruptcy protection in 1996. She was required to list all her assets and to turn some of them over for liquidation. She identified and turned over 200 shares of Wal-Mart stock and 100 shares of Food Lion stock but, in fact, owned 800 shares of Wal-Mart stock and 500 shares of Food Lion stock. She then sold the other 600 shares of Wal-Mart stock for $16,045 and deposited the proceeds into her husband's bank account without reporting the transaction to the bankruptcy trustee. The next day she and her husband withdrew $10,000 from the account in the form of four $2,500 cashier's checks, which they used to pay personal expenses and repay a loan from a relative. When confronted by the bankruptcy trustee, Ms. Woods confessed to the concealment of the Wal-Mart stock but insisted that she'd disclosed all her other assets. It turned out, however, that she had sold the other 400 unreported shares in Food Lion for $3,274 and used the proceeds to pay personal expenses. Ms. Woods was indicted on one count of bankruptcy fraud in violation of 18 U.S.C. § 152 and one count of engaging in a monetary transaction with the proceeds of the bankruptcy fraud in violation of 18 U.S.C. § 1957 for deposit of the Wal-Mart stock proceeds into her husband's bank account. She pled guilty to both counts. At sentencing, Ms. Woods moved for a downward departure from the money laundering guideline, arguing that her conduct was outside the "heartland" of the money laundering cases. The district court agreed and, using the guideline for bankruptcy fraud, sentenced Ms. Woods to three years' probation.

The Eighth Circuit, in a unanimous decision (although one member of the panel died before the

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opinion was issued, a footnote indicates that the opinion was consistent with the vote he cast at conference in the case), affirmed the trial court's departure. In doing so, it relied on a 1995 report by the Sentencing Commission which urged amendment of the money laundering sentencing guidelines to eliminate sentencing anomalies resulting from use of the statutes in ways the commission had not anticipated when the guidelines were first promulgated. While Congress ultimately overruled the Sentencing Commission's proposed amendments to the money laundering guidelines in 1995, the panel found nothing in the accompanying House Report to suggest that Congress, in disapproving the proposed amendments, also intended "to prohibit sentencing courts from departing downward, where appropriate, in receipt-and-deposit cases or in those individual cases that do not involve aggravated money laundering activity."

The panel also cited the Department of Justice's "1996 Report to Congress on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering," as well as the Sentencing Commission's response thereto. Ultimately, the court found that the deposit of the check by Ms. Woods into her husband's account, or their obtaining of the cashier's checks, did not constitute serious money laundering conduct as contemplated by the Sentencing Commission for punishment under the money laundering guidelines. Consequently, the district court did not abuse its discretion when it found that Ms. Woods' case fell outside the "heartland" and granted her motion for a downward departure.

The third case, which defies logic and stretches the "heartland" doctrine to the breaking point, is *United States v. Blarek*, 7 F. Supp. 2d 192 (E.D.N.Y. 1998). *Blarek* involved two interior decorators who became the personal interior decorators of Jose Santacruz Londono, a major Cali cartel drug trafficker. Over a twelve-year period, Defendants designed and decorated a number of offices and living spaces for Santacruz, his wife, his mistresses, and his children. According to the presentence reports, Defendants' offense conduct after 1986 involved at least $5.5 million, approximately half of which was paid in cash. Defendants traveled to Miami, New York City, and other locations to receive large sums of money from Santacruz's couriers: payments as high as $1 million. Defendants were convicted at trial of racketeering conspiracy and money laundering conspiracy (18 U.S.C. § 1956(h)). The presentence reports assessed Defendants' offense levels at 33 (135-168 months).

Notwithstanding this egregious example of mainstream money laundering for a major member of the Cali cartel, the trial court found that this case was outside of the heartland of racketeering and money laundering conspiracy cases contemplated by the guidelines. The court found that, "[u]nlike those in most prosecutions in drug money laundering cases, the acts of these defendants were not ones of pure personal greed or avarice. While their manner of living did greatly improve with the receipt of their drug-tainted income, their state of mind was one that was much more complicated—driven largely by excessive artistic pride." 7 F. Supp. 2d at 211.

Consequently, the court held:

> The unique motivations behind their crimes do make defendants' acts somewhat different from those in the mainstream of criminality. While still morally culpable, the state of mind of these defendants must be taken into account when considering the various rationales behind criminal penalties. Because this and other factors 'distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing,' departure is encouraged.

7 F. Supp. 2d at 211. After adjusting the offense levels for other factors, the trial judge departed downward six levels for each defendant, resulting in an offense level of 26 for Defendant Blarek (sentence of 68 months' incarceration) and an offense level of 23 for Defendant Pellecchia (sentence of 48 months' incarceration). After this case, it is difficult to determine if there are any limits to the "heartland" analysis.

United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998). Contact: Attorney Jacob Shaye Frenkel, Office of Independent Counsel, (703) 706-0100.

United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). Contact: AUSA Richard Monroe, AMOWS01(rmonroe).

United States v. Blarek, 7 F. Supp. 2d 192 (E.D.N.Y. 1998). Contact: AUSA Richard Weber, ANYE12(rweber).

Money Laundering/ Transaction/Conspiracy

- *Evidence was sufficient to establish that the funds at issue were utilized in some form of transaction.*
- *Fifth Circuit found it unnecessary to rule whether an overt act is required in a conspiracy prosecution under section 1956(h).*

While this case does not present major money laundering issues, it is of interest because the subject of the prosecution was Juan Garcia Abrego, a major Mexican drug trafficker who, for approximately two decades, was the hub of a narcotics smuggling syndicate of staggering dimension. Headquartered in Matamoros, Mexico, Abrego's organization was responsible for smuggling tremendous quantities of cocaine and marijuana into the United States from the mid-1970s to the mid-1990s. During this time, his organization derived substantial profits from its drug trafficking activities. One of Abrego's associates testified at trial that he collected $60-70 million on behalf of the organization in New York and shipped it back to Matamoros. After being convicted of all 22 drug trafficking and money laundering counts at trial, Abrego was sentenced to life imprisonment and ordered to forfeit $350 million.

On appeal, Abrego challenged his section 1956(a)(1) convictions on the basis that the Government failed to prove a transaction involving the funds because it offered no evidence of a disposition of the funds. The appellate court disagreed, finding that, in each case, the Government presented sufficient evidence for the jury to conclude that the funds at issue were utilized in some form of transaction. One count, for example, was based on the seizure of $4 million from a secret compartment in a van at a truck repair shop. With respect to that seizure, an IRS special agent testified that he saw two of the conspirators drive the van to a shopping mall and turn the van over to two other conspirators. From that point forward, law enforcement officials maintained constant surveillance of the van until the time of its seizure. From this evidence, the jury could reasonably conclude that the series of events involved one or more dispositions of the money recovered from the van because, on more than one occasion, the van, along with its contents, was given over to the care or possession of another and that the transaction was in furtherance of the conspiracy.

A second money laundering issue addressed by the appellate court was the issue of whether a conspiracy to launder money under section 1956(h) requires proof of an overt act. The court noted that section 1956(h) has language virtually identical to the narcotics conspiracy statute, 21 U.S.C. § 846, and the Supreme Court has held that a conviction under section 846 does not require proof of an overt act. *See United States v. Shabani*, 513 U.S. 10 (1 994). However, the Fifth Circuit found that it was not necessary to address the issue because the substantive money laundering counts in the indictment satisfied the overt act requirement, should such a requirement exist.

United States v. Abrego, 141 F.3d 142 (5th Cir. 1998). Contact: AUSA Susan B. Kemper, ATXS02(skemper).

Money Laundering/ Proceeds

- *Checks which were obtained through theft or fraud may constitute "proceeds" of those crimes and the use of such checks in a subsequent financial transaction constitutes money laundering.*

Defendants in this case purchased credit cards stolen from the mail by letter carriers. They then drew cash advances and made purchases on the stolen credit cards until the available credit was depleted. Using the stolen credit cards and illegally obtained information, Defendants opened checking accounts in the cardholders' names, withdrew the money used to open those accounts, and then used checks drawn on the closed or empty accounts to pay the balances on the credit card accounts. Since the credit card companies customarily honor the checks immediately, the defendants were able to deplete the available credit through further spending and cash advances before the credit card companies discovered that the checks were drawn against insufficient funds. Checks used to extend the fraud in this fashion are termed "booster" checks.

Defendants were charged in an indictment with four violations of section 1956(a)(1)(A)(i), based on the deposits of stolen or fraudulently obtained checks to the account of a stolen credit card. Defendants each pled guilty, *inter alia*, to one money laundering count but reserved the right to appeal the money laundering count on the basis that it failed to

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properly charge an offense because the booster checks were worthless and thus could not constitute proceeds of illegal activity.

In rejecting this argument, the Ninth Circuit first noted that the term "proceeds" is not defined in the statute. Consequently, the term should be interpreted as taking its ordinary, common meaning. After reviewing the dictionary definition, the court concluded that, "while the term 'proceeds' may refer to something of value, the term has the broader meaning of 'that which is obtained . . . by any transaction.'" In this latter sense, the court decided, checks stolen from the mail or obtained by fraud are proceeds of the criminal enterprise. While the "proceeds" involved in a money laundering transaction are typically cash or money in some other form, in this case the property involved in the subsequent financial transactions was illegally obtained checks, which were involved in subsequent financial transactions when they were sent to credit card companies to pay the balances on credit card accounts.

Pertaining to Defendants' argument that the checks were worthless, the court noted that the statute does not require that the proceeds have intrinsic value. The blank checks were the yield or return of criminal activity. Moreover, the checks were not worthless because each check had the proven capacity to fool the credit card companies into issuing thousands of dollars worth of credit and enabled Defendants to extract that valuable credit through cash advances and purchases. Thus, the submission to the credit card companies of checks which were the proceeds of earlier thefts or frauds properly constituted money laundering and Defendants were properly convicted.

United States v. Akintobi, 159 F.3d 401 (9th Cir. 1998). Contact: AUSA Dan O'Brien, ACAC15(dobrien).

Comment: While the money laundering convictions were affirmed and section 1956 was properly employed in this case, which involved a sophisticated fraud and theft scheme, the court's decision in this case can lead to a variety of applications of the money laundering statutes which may not be warranted. For example, not every stolen check case should be charged as a money laundering violation, even though such a charge may be legally viable. As indicated in the cases on sentencing guideline departures discussed *supra*, many courts disapprove of the use of the money laundering statutes in the context of relatively minor or mainstream fraud cases. Prosecutors should be sensitive to those concerns and use the money laundering statutes judiciously in those serious cases where their use is warranted.

Money Laundering/ Knowledge

- *Evidence was sufficient to establish Defendants' knowledge that the money put into a trust account constituted proceeds of illegal gambling.*

Defendant Poe and others were convicted of operating an illegal gambling business in violation of 18 U.S.C. § 1955. Poe was also charged with conspiring with his accountant, Porter (who was immunized and testified at trial), to launder money in violation of section 1956(h). Accountant Porter testified that Poe hired him for purposes of setting up his financial house in order and to keep accurate records for income tax purposes. While Porter testified that he knew that the money flowing into the trust account was gambling proceeds, Poe contended that the Government failed to produce any evidence that he or Porter knew that the gambling proceeds were derived from "unlawful activity." In support of his claim, Poe cited both his and Porter's testimony that Poe's attorney had assured them that the gambling operation did not violate federal gambling laws.

The appellate court rejected this argument, finding that it overlooked Poe's patent violation of Oklahoma law. Neither section 1956 nor the indictment in this case specifies the "unlawful activity" which is required to support a conviction under section 1956. In its closing argument to the jury, the Government maintained that the money in the Porter trust account was the proceeds of a gambling operation which violated Oklahoma law. Therefore, Poe's and Porter's beliefs regarding the legality of the gambling operation under federal law were irrelevant to the charge. Finding that there was sufficient evidence in the record to demonstrate that Poe's gambling operation violated Oklahoma law, the remaining issue was whether the Government proved that Poe and Porter had knowledge that the operation was unlawful. On this issue, the court held that the jury had sufficient evidence to infer Poe's knowledge of the illegality of the operation from the manner in which he conducted the business (*e.g.*, controlled access to the gambling business, a chain link fence, barred door, and surveillance cameras guarding the premises). With respect to Porter's knowledge, the court determined that Porter's careful testimony concerning the legal opinion that Poe's operation did not violate federal law allowed the jury to infer that Porter believed that the operation may have violated state law. As a result, the court concluded that the evidence as a whole, together with the reasonable inferences to be drawn therefrom, was sufficient to allow the jury to find that Poe and Porter knew that the money which passed through the trust account was the proceeds of an illegal gambling business.

United States v. Boyd, 149 F.3d 1062 (10th Cir. 1998). Contact: AUSA Mary M. Smith, AOKW01(msmith).

Money Laundering/ Concealment

- *Evidence was sufficient to establish the element of concealment in the money laundering transactions, even though the illegal proceeds were in accounts in Defendant's own name.*

Defendant Trost was the elected county clerk and recorder of Monroe County, Illinois. During his thirty-year term in office, Trost devised a scheme to defraud the county of $100,000. Under this scheme, Trost allowed those patrons of the clerk's office who regularly made photocopies of documents to run up a tab and to be billed for their copies. When customers mailed in their payments, Trost deposited the funds into an account he set-up in the name of "Richard A. Trost Special Account." The account bore Trost's home address and social security number. In addition to the photocopying payments, Trost also deposited into this account unauthorized transfers from other county accounts. He subsequently transferred funds from the "special account" into his joint account with his wife. When the scheme was discovered, Trost was charged in a 17-count indictment with mail fraud, theft under section 666, and money laundering in violation of section 1956(a)(1)(B)(i). He was convicted and sentenced to 50 months' imprisonment.

Trost challenged his money laundering convictions on the ground that his actions did not involve concealment or disguise. He based this argument on the fact that all of the bank accounts he used to transfer the stolen funds were in his own name or traceable to him. The court rejected this argument, finding that, while the "special account" was in Trost's name, it was in a manner designed to convince the bank that it was a "special" county account where he would be authorized to deposit the county money. In fact, the arrangement apparently prevented the bank from becoming suspicious while also successfully hiding the money from the county. Thus, Trost's money laundering convictions were affirmed.

United States v. Trost, 152 F.3d 715 (7th Cir. 1998). Contact: AUSA Michael Thompson, AILS01(mthompso).

SARS: A Nationwide System

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component of the flexible and cost-efficient compliance program under the BSA required to prevent the use of the nation's financial system for illegal purposes.

SARS Requirements

The relevant rules call for the reporting of five general types of activity:

- insider abuse of a financial institution involving any amount detected by the institution;
- federal crimes against, or involving transactions conducted through, a financial institution that the financial institution detects and that involve at least $5,000 if a suspect can be identified, or at least $25,000 regardless of whether a suspect can be identified;
- transactions of at least $5,000 that the institution knows, suspects, or has reason to suspect involve funds from illegal activities or are attempts to hide those funds;
- transactions of at least $5,000 that the institution knows, suspects, or has reason to suspect are designed to evade any regulations promulgated under the BSA; and
- transactions of at least $5,000 that the institution knows, suspects, or has reason to suspect to have no business or apparent lawful purpose, or the transactions are not the sort in which the particular customer would normally be expected to engage and for which the institution knows of no reasonable explanation after due investigation.

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Who Uses the Reported Information?

Currently, five federal law enforcement agencies have full access to the information in SARS. Three of the five agencies—the Federal Bureau of Investigation, the U.S. Secret Service, and the U.S. Customs Service—have chosen to obtain SARS information by downloading data in bulk onto their internal computer systems rather than obtaining access to the system itself. In addition, every U.S. Attorney's Office has access to SARS.

Conclusion

SARS has made a strong and effective beginning. A nationwide system is now in place for the filing and distribution of suspicious activity reports. Equally, if not more importantly, the banking community has made strong efforts to support SARS.

The process of building the system, however, is far from over. The system's effectiveness depends upon continued attention to the steps necessary to bring it to maturity. Improving analysis of information, tracking resulting cases, refining expectations about the scope of reporting, and providing feedback to financial institutions are all part of the growth process. These steps can only occur if all the government agencies and private institutions involved work together to identify and solve problems in the system's operation.

Connecticut Attorney Prosecuted for Money Laundering Violations

By Mathew Bode, Attorney, and Wendy Silberberg, Attorney, AFMLS, Criminal Division

On August 20, 1998, prominent Hartford, Connecticut, Defense Attorney M. Donald Cardwell pled guilty in U.S. District Court in Hartford to a two-count criminal indictment, charging him with money laundering in violation of 18 U.S.C. § 1957 and failure to file an Internal Revenue Service (IRS) Form 8300 in violation of 26 U.S.C. §§ 6050I and 7203. Cardwell also agreed to the criminal forfeiture of $20,000. The plea is the culmination of a two-year joint investigation involving active participation of the Drug Enforcement Administration, the IRS, the U.S. Attorney's Office, and the Department of Justice.

Cardwell has been a trial lawyer for 29 years and is the senior partner in the law firm he founded with his brother. Cardwell's case received wide media attention in Connecticut as he is the only Connecticut attorney to date prosecuted by the Department of Justice for money laundering violations.

The money laundering offense arose from Cardwell's involvement in laundering money provided to his law firm by a large-scale narcotics trafficker, Edwin Gomez, to purchase a house. The firm also complied with Gomez' request to have the house titled in the name of a nominee owner. Gomez is serving 17½ years in prison for trafficking in cocaine.

The failure-to-file offense resulted from Cardwell's receipt of $11,000 in cash as a partial attorney fee payment from Juan Pagan, another large-scale narcotics trafficker, and his concealment of that transaction by neglecting to file the appropriate IRS form within the required time period. Although the form was ultimately filed, Cardwell did so only after receiving information about the federal investigation. Pagan is serving a sentence of 21 years for trafficking in cocaine. Gomez and Pagan have admitted to selling more than 150 kilograms of cocaine.

Cardwell's sentencing is scheduled to be held in early January 1999, before the Honorable Alvin W. Thompson in Hartford. Cardwell is subject to a possible maximum sentence of 15 years imprisonment and a possible maximum fine of $500,000. The applicable Sentencing Guidelines in the case are 21 to 27 months' imprisonment and a fine range of $5,000 to $50,000.

The prosecution of Cardwell was conducted by Department of Justice's Senior Counsel William J. Corcoran, Campaign Finance Task Force, and Trial Attorneys Mark D. Rubino and Matthew S. Bode, AFMLS, Criminal Division.